**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF KIGOMA**

**AT KIGOMA**

**(DC) CIVIL APPEAL NO. 13 OF 2021**

(Arising from decision of the Kigoma District Court in Civil Case No. 8/2021 before Hon. Resident Magistrate K.V. Mwakitalu)

**MICHAEL MTAMBARA KUNYAMILA ..... APPELLANT**

**VERSUS**

**ZANE MICROFINANCE CREDICT ..... 1ST RESPONDENT**

**SCLSCLT SMART COMPANY LIMITED .....2ND RESPONDENT**

**OSCAR JOHN MGAYA ..... 3RD RESPONDENT**

**ISACK MMASI .....4TH RESPONDENT**

## RULING

10/8/2022 & 12/8/2022

**F. MANYANDA, J**

The appellant, Michael Mtambara Kunyamila, is distressed by an order which was unleashed by the District Court of Kigoma in Civil Case No. 08 of 2021 in its ruling dated 11/11/2021 striking out the suit. The ruling followed a preliminary objection raised by the Respondents to the hearing of the case on grounds that the trial court lacked territorial jurisdiction to entertain the case and that the plaintiff lacked cause of action against the 3rd and 4th

respondents. Whereas the trial court sustained the first ground of preliminary objection and struck out the suit. The appellant has raised a total of four 4 grounds which I reproduce hereunder: -

1. *That, the learned magistrate with all due respect erred in law and in fact for failure to interprete(sic) on situate (sic) of the vehicle thus the erroneous decision by the Hon Magistrate;*
2. *That, the Hon Magistrate erred in law and facts for failure to hold that the vehicle being converted/seized at Kigoma was capable of being challenged for release at Kigoma*
3. *That, the Hon Magistrate erred in law and facts for holding that the vehicle is in Mwanza without any proof.*
4. *That, the Hon. Magistrate erred law and in fact for failure to hold that the Respondents operating through online business they have extended their area of operation.*

At oral hearing the appellant appeared unrepresented while the Respondents were represented by Mr. Moses Rwegoshora, learned Advocate.

When appeal hearing was about to take off, Mr. Rwegoshora raised a legal concern on propriety of the appeal before this court. He contended that since

the suit from which the appeal emanates was struck out, then the appeal is improperly before this court because the remedy available to a struck-out suit is to refile afresh properly in accordance with the law; not to appeal.

The counsel cited the case of **Masolwa D. Masalu vs Attorney General and Another**, Civil Appeal No. 21 of 2017, CAT at DSM (unreported)

The counsel went on elaborating that there is a difference between striking out a suit and dismissing a suit. That in dismissal of a suit, parties are heard while they are not heard in striking out of a suit.

He was of the views that in the instant appeal the parties were not heard on merit. The counsel also cited a case of **National Insurance Company Ltd vs Shengena Ltd,** Civil Application No. 230 of 2015 CAT at Dar es salaam where the differences of the two words were discussed.

He then conluded that this appeal has been filed pre-maturely because he ought to have refiled his case in a court of competent jurisdiction. Mr. Rwegoshora invited this court to strike out the appeal for been incurably defective with costs.

On his side the Appellant, been a lay person, had nothing to say other than to adopt his grounds of appeal.

As it can be seen the counsel for the Respondents raised the question of law as a plea in *limine litis* to the hearing of this appeal. It is trite law that where a court is seized with a point in *limine litis*, it has to dispose off that legal issue first before going into the merits of the concerned matter.

This was the holding in the case of **Shahida Abdul Hassanali Kassam vs Mahedi Mohamed Gulamali Kanji,** Civil Application No. 42 of 1999 (unreported) where the Court Appeal stated as follows:

> *"The whole purpose of preliminary objection is to make the court consider the first stage much earlier before going into the merits of an application....so in a preliminary objection a party tells the court that the existing circumstances do not give you jurisdiction. It cannot be gain said that the issue of jurisdiction has always to be determined first"*

The Court of Appeal in a later case of **Bank of Tanzania vs Derram P. Valambia,** Civil Application No. 15 of 2002 (unreported) restated the principle in **Shahida Abdul Hassanali's Case** (supra) in the following words: -

> *"The aim of a preliminary objection is to save the time of the court and the parties by not going into the merits of*

*an application because there is a point of law that will dispose of the matter."*

In this matter the counsel is objecting the hearing of this appeal because it has been brought prematurely. That the parties were not heard on merit before the trial court, hence the appeal was only struck out on legal technical flaw; not dismissed.

The objection by the counsel is centered on the interpretation of the words "*struct out*" and "*dismiss*" and their effect when used to terminate suit.

I have read the case of **National Insurance Corporation (T) Ltd** (supra) cited by the Respondents Counsel. In that case the Court of Appeal referring to a famous case of **Ngoni Matengo Cooperative Marketing Union Ltd vs Ali Mohamed Osman** [1959] It A 577 at page 580 made a distraction between "*struck out*" and "*dismiss*", it stated as follow.

*"In the present case therefore .....when the appeal came before this court, it was incompetent for lack of the necessary decree .....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 to have done in each case was to "strike out" the appeal being incompetent, rather than*

*to have dismissed it, for the later phrase implies that a competent appeal has been disposed while the former implies that there was no proper appeal capable of being disposed of"*

In that case a High Court Judge "struck out" an application after hearing it on merit and finding it non-meritorious instead of "dismissing" the same, which means the applications was competent before it.

I have also read the case of **Masolwa D. Masalu (supra)** in that case the Court of Appeal dealt with an appeal from an order of the High Court "striking out" an application for non-citation of enabling law. The Court of Appeal referred to its earlier decision in a case of **Joseph Mahona @ Joseph Mbije @ Maghembe Mboje and Another vs Republic** Criminal Appeal No. 215 of 2008 (unreported) where it stated as follows: -

*"In the instant case, the matter before the High Court was not dismissed but struck out. That implies according to* ***Ngoni Matengo Co-operative Marketing Union Ltd vs Ali Mohamed Osman*** *[1959] IEA 577 the matter was incompetent which means there was no proper application capable of been disposed of. The established practice is that the applicant in an application which has been "struck out" is at liberty to file another competent*

*application before the same court before opting to appeal as it has appeared in this appeal"*

In that case the applicant in a labour application moved the High Court for extension of time within which to file an application for leave to apply for prerogative orders of certiorari and mandamus. The High Court found that it was moved under wrong provision of the law and "*struck out*" the application. The court of appeal advised the appellant to have involved "*The established practice of refiling a proper drawn application before opting to appeal".* The reason for advising so is that the High Court did not hear the parties on merit.

A question I have asked myself is whether the situation in the instant matter is tenable for the Appellant to have refiled the suit in the same court which "*struck out*" it for want of jurisdiction.

In my opinion the answer to that question is in negative. I say so because the District Court of Kigoma declared that it had no jurisdiction to try the suit in the form it was. It alleged that, the subject matter been relocated out of its territorial jurisdiction, lacked jurisdiction, hence practically refiling of the same suit in it was rendered impossible. This means the suit was brought to an end.

What is the option that was open to the appellant under these circumstances?

In my view, the appellant can challenge that decision if in the circumstances of the case where the order finally extinguished the matter.

The circumstances in the case of **Masolwa D. Masalu (supra)** cited by the Respondent's Counsel concerned wrong – citation of enabling law a defect which could be rectified by filing a fresh application citing the proper enabling law.

In the appeal at hand the District Court declared itself that had no jurisdiction to try the case. By so saying it meant that the appellant was barred from returning to it as far as the subject matter is concerned. Hence in my considered opinion the words "*strike out*" may sometimes have the same effect as that of "*dismiss*" where the right of a party is totally extinguished.

In the case of **Ngoni Matengo Co-operative Marketing Union Ltd (supra)** at page 580 the then East Africa Court of Appeal said: -

> *"it is the substance of the matter that must be looked rather than the words used"*

My understanding of this holding is that when it comes at considering the consequences of the words "striking out" or "dismissal" of a suit, it is the substance of the suit that has to be looked at rather than the words. Where like in this matter vividly extinguished the rights of a party making him unable to return to it, I think he is entitled to challenge such an order on appeal.

I have examined the grounds of appeal all deal with the manner and use of the word striking out order not the suit itself.

In the upshot, for reasons stated above, I find the preliminary objection is misplaced.

Consequently, I make the following orders.

1. The preliminary objection is hereby overruled
2. The appeal to proceed to hearing on merit.
3. Hearing of the appeal will be on 15/09/2022. Order accordingly.

Dated at Kigoma this 12th day of August, 2022.

**MANYANDA**

**JUDGE**