

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

**BUKOB A DISTRICT REGISTRY**

**AT BUKOB A**

**MISC. LAND APPLICATION NO. 33 OF 2022**

*(Arising from Misc. Application No.15 of 2022 and Land Appeal No.53 of 2019 of the High Court of Tanzania at Bukoba and Application No.139 of 2018 of the Bukoba District Land and Housing Tribunal)*

**SIMON KAJUGUSI BANDAULA .....APPLICANT**

**VERSUS**

**STEWATH PETRO.....1<sup>ST</sup> RESPONDENT**

**MERNA EZRA.....2<sup>ND</sup> RESPONDENT**

**KOKUSIMA LAURIAN.....3<sup>RD</sup> RESPONDENT**

**RULING**

*01/09/2022 & 27/09/2022*  
**E. L. NGIGWANA J.**

This ruling is seeking to determine the preliminary points of objection raised by the respondents through their advocate Mr. Lameck Erasto, against the applicant's application that;

- (a) This court is not competent to act upon the Application after had already dismissed the same on 28<sup>th</sup> February, 2022 vide the Miscellaneous Land Application No. 15 of 2022.*
- (b) That, the Application is omnibus seeking for the two distinct reliefs.*

Briefly, the facts touching on the historical background on this matter as can be discerned from the available record gather that; the applicant had once filed Miscellaneous Land Application No. 15 of 2022 on 28

January, 2022 in this court praying for extension of time to file the application for the leave to appeal to the Court of Appeal, and subject to granting extension of time, leave to appeal to the Court of Appeal. The same was made by way of chamber summons made under section 5 (1) (c) and 11 (1) of the Appellate Jurisdiction Act, [Cap.141 R:E 2019] and section 47 (2) and (4) and 48 (2) of the Land Disputes Courts Act Cap 216 R:E 2019 and Rule 45 (a) of the Tanzania Court of Appeal Rules 2009 by G.N. No. 344 of 2019.

The said application was dismissed by this court on 28<sup>th</sup> February, 2022 before His Lordship Kilekamajenga, J owing to the reason that the chamber summons and its accompanying affidavit were drawn by an unqualified person. Later on, that is to say; on 15<sup>th</sup> day of March, 2022, the current application was filed to rejuvenate the dismissed one seeking for the same prayers previously sought.

On consensus of both parties, the Preliminary Objections were ordered to be disposed by way of written submissions upon which all parties complied with accordingly.

Mr. Lameck representing the respondents submitted on both objections where he started with first P.O that the court cannot entertain the application which had already been dismissed by the same court. He substantiated that the applicant had no remedies against the dismissed application by the same court. He cited the case of **Consolidated Holding Cooperation versus Shengena Limited**, Civil Application No.20 of 2007 which was cited in approval in the case of **Amina Issah versus White Sand Hotel**, Civil Revision No. 55 of 2010 at page 8 where his Lordship reproduced what the Court of Appeal said that;

*"According to the court of appeal "dismissal" would imply that the matter has finally been determined and generally after-hearing merits of the arguments. A dismissal order does not entitle a party to go back to the same court to challenge the order."*

With regard to the second P. O, Mr. Lameck submitted that the application is omnibus to the extent that it seeks more than one Reliefs. He added that the reliefs of extension of time to file application for leave to appeal to the Court of Appeal and also leave to appeal to the Court of Appeal are different and cannot be dealt with by the court simultaneously as it not allowed by law.

He cited the case of **The Registered Trustees of Archdiocese of Songea versus C. F Builders Limited**, Civil Application No. 462/10 of 2017 at page 10 of the ruling where the Justices of Appeal cited the case of **Daudi Lengiyau versus Dr. David Shungu**, Civil Application No. 28 of 2015 and **Bibie Hamad Khalid versus Mohamed Enterprises (T) Ltd and 2 others**, Civil Application No. 6 of 2011 where it was held:

*"..... It was wrong for the notice of motion to contain omni-bus application."*

He also quoted **the registered Trustees of Archdiocese of Songea** case which held that

*"As pointed earlier, it is wrong for a notice of motion to contain omni-bus applications. As application for Revision which is under the domain of three justices cannot be in the same notice of motion with an application for extension of time which is to be heard by a single justice. The defect renders the application incompetent for being omnibus"*

In reply, Advocate Pereus Mutasingwa who represented the applicant responded that the raised objections do not qualify to be termed as preliminary objections in the meaning propounded in **Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors LTD** [1969] E.A. 696. That no preliminary objection can be raised if some facts have to be ascertained or if argued would dispose of the suit. He had referred me a litany of similar authoritative cases on the issue which I see no need to reproduce them here as it suffice to refer the already cited landmark case.

He was to the effect that, in order to determine the raised objections, the court will resort to search for facts and obtain evidence from parties as to whether the current application had already been dismissed on 28<sup>th</sup> February 2022 vide the Land Application No. 15 of 2022. He argued that Land Case Misc. Application No. 33 of 2022 had never been dismissed, what was dismissed is Misc. Application No. 15 of 2022 which does not bar the applicant to institute a new application. He cited the case of **Essaji and Others versus Solanki** (1968) EA. 218 where the court held amount other things that the application before the court was not one to extend time for filing an appeal which had already been filed as there was no competent appeal before the court.

Advocate Mtasingwa contended that when an application or an appeal has been dismissed not on merits but for being incompetent in one way or the other, the applicant is free to file afresh application or appeal to the same court after rectifying the detected defects. He submitted that the dismissal order without hearing parties on merit to decide rights of parties is treated as struck out order. He referred this court to the case of **Mary Agnes Mpelumbe (administratrix of the estates of the late Isaya Simon Mpelumbe) versus Shakha Nasser Hamad**, Civil Appeal

No. 136 of 2021 at page 15, 16 and 17 where the Court of Appeal was elaborating on rule 90 (3) of the Court of Appeal Rules. Another case referred to me was **Ngoni Matengo Cooperative Marketing Union LTD versus Ali Mohamed Osman** (1959) E.A 577, CAT at Dar es Salaam, **Blue Star Service Station versus Jackson Musseti T/A Musseti Enterprises** (1999) TLR 80.

Concerning the second preliminary objection, Mr. Mtasingwa contended that the omnibus application by combining two prayers in one application is legally allowed provided that the prayers are interlinked or interdependent. He bolstered his argument by the Court of Appeal case in **MIC Tanzania LTD versus Minister for Labour and Youth Development and Attorney General**, Civil appeal No. 103 of 2014 at p.9 and 10.

Having considered the submissions of both learned advocates on the two preliminary objections on point of law, I am now duty bound to determine them. I chose to start determining the first preliminary objection because if sustained may dispose the entire application. Before I take off, the applicant's counsel in his submission in reply had exhausted enough time with volume of authorities challenging that the preliminary objections raised by the respondent's counsel are not preliminary objections on the point of law in the meaning propounded in **Mukisa Biscut Manufacturing case**. With due respect to the applicant's counsel, this argument will not labour me because the first objection which I endeavour to determine, questions the jurisdiction of this court for being *fanctus officio* which is the pure point of law for this court to satisfy itself. I respectfully hold that such argument is misconceived. The first objection reads;

*"That, this court is not competent to act upon the Application after had already dismissed the same on 28<sup>th</sup> February, 2022 vide the Miscellaneous Land Application No. 15 of 2022."*

The pleadings in this case file are correct that the same parties on the same subject matter which is an application for leave to appeal to the Court of Appeal against the ruling and order delivered on 22<sup>nd</sup> October 2021 by this court was dismissed for being drawn by unqualified person. The current Land Application No. 33 of 2022 with the same parties praying for the same reliefs in the same court seeking to challenge the same decision is again filed in this court.

I entirely and respectfully agree with Mr. Lameck that the court cannot entertain the application or matter which had already been dismissed by the same court save for application to set aside the dismissal order, as the only remedy for the matter dismissed is to file an appeal against it to the higher court. Dismissal order implies that the matter has finally been determined and generally after hearing merits of the arguments. A dismissal order does not entitle a party to go back to the same court to challenge the Order. This was a stance celebrated in the court of appeal case of **Consolidated Holding Cooperation versus Shengena Limited**, Civil Application No. 20 of 2007 which was cited in approval in the case of **Amina Issah versus White Sand Hotel**, Civil Revision No. 55 of 2010 at page 8 also relied by the respondent's counsel.

The case of **Mohamed Enterprises (T) Limited versus Masoudn Mohamed Naseer**, Civil Application No. 33 of 2012 (unreported) reminds us and reinforces the sanctity of the decision of a Judge and the fact that another Judge is not supposed to set aside the decision of another Judge in the same court.

I am hesitant to borrow the applicant's counsel idea that the "dismissal order" which is ordered by the court when the matter is not heard on merit is the same as a "struck out" order which allows the applicant to return to the same court to file the dismissed matter afresh. He was fortified by the case of **Ngoni Matengo (Supra) and Masolwa D. Masalu versus AG and Another**, Civil Appeal No. 21 of 2017, CAT (Unreported).

In my view, I find these cases referred to me by the applicant are distinguishable from our case at hand. It is trite law that where the application is struck out for incompetence, the door is still open to the applicant to approach the same court for redress through a properly constituted application. See the case of **Masolwa D. Masalu versus AG and Another**, Civil Appeal No. 21 of 2017 CAT (Unreported). In our case, this court dismissed the application for being drawn by an unqualified person. In other words, it was dismissed for being incompetent. Now, the order which is apparent on the record is "**dismissal**" but the applicant argues that this order should be dealt as "**struck out order**" as the merit of the case was not determined whereas the respondent's counsel sticks on what the order of the court speaks for itself.

Now, the issues which have greatly disturbed my mind are; **One**, who is supposed to adjudicate that this court (His Lordship Kilekamajenga, J made an error? Is it the applicant? Obviously he is not. Is it me (this court)?. Obviously not, since matter has not come to this court by way of review.

The court cannot resurrect an application it killed (dismissed). It needs another power from another powerful forum or court to resurrect the

dismissed application. I paused to ask whether the applicant has no right to appeal on this matter to have the order quashed?

In my view the applicant's right to appeal and/or review have not been ousted by either provision. It is my considered view that, it is only the Court of Appeal of Tanzania that can substitute the said order.

There is the recent warning from the Court of Appeal, of which I drive much help, in **Maria Chrysostom Lwekamwa versus Placid Richard Lwekamwa and another**, Civil Application no. 549/17 of 2019, CAT at Dar es salaam (Unreported) where the court is quoted stating that:

*"It is settled that a judge or magistrate should refrain from setting aside the decision of a fellow judge or magistrate (see, Mohamed Enterprise (supra)).....It is trite law that when a court finally disposes of a matter, it seizes to have jurisdiction over it."*

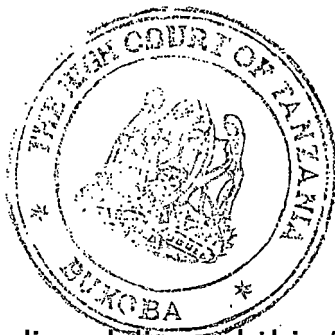
Sincerely, I see no how I can determine/attack or quash the order of my fellow judge and decide that the dismissal order wasn't correct and order to be replaced with the struck-out order to enable the applicant to file his dismissed application again in this court. My hands are sincerely tied as this court becomes *functus officio* in the absence of review proceedings.

In the end result, I find merit in the first preliminary objection and sustain it. Since the first P.O suffice to dispose the matter, I therefore see no reason to determine the remaining. The application is therefore dismissed with costs.

Order accordingly.

Dated at Bukoba this 27<sup>th</sup> day of September, 2022.





  
E.L. NGIGWANA

JUDGE

27/09/2022

Ruling delivered this 27<sup>th</sup> day of September, 2022 in the presence of the applicant in person, First respondent, Ms. Erieth Barnabas learned counsel for the respondents, Hon. E. M. Kamaleki, Judges' Law Assistant and Ms. Mwashabani, B/C.



  
E.L. NGIGWANA

JUDGE

27/09/2022