

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. CIVIL APPLICATION NO. 80 OF 2022

(Arising from the Civil Appeal No. 35 of 2022)

1. CHASA YAHAYA MONGELA
 2. HUMUD SEIF RIYAMI
 3. AMIR JUMA
 4. ADAM MKAMA
 5. JUMA MASONDOLE
 6. RAJAB M. MBALAMWEZI
 7. ISMAIL DOTTO
- APPLICANTS**

VERSUS

1. REGISTERED TRUSTEES OF BARAZA
KUU LA WAISLAMU TANZANIA(BAKWATA)
 2. RAMADHANI HARUNA CHANILA
 3. ONGUJO SHABAN ONGUJO
 4. ABAS ATHUMAN
 5. ABDUL RAHMAN KHALFAN KANGE
 6. AMIR ZUBER LUHENDE
 7. MAWAZO HUSSEIN SALIM
 8. ABDULSALAM OMARY
 9. OMAR ISSA SURVE
 10. HASSAN JUMA MBALA
 11. HASHIM ALY KALUNGAYA
 12. HUSSEIN AMIR MAFTAH
-**RESPONDENTS**

RULING

*Last Order: 22/09/2022
Ruling Date: 29/09/2022*

M. MNYUKWA, J.

This is a Ruling in respect of the application filed by the applicants under Certificate of Urgency. The application is brought by way of



chamber summons supported by the affidavit of the applicant's counsel, Mr. Gibson Ishengoma. In the present application, the applicants asked this court to make inter-parties and ex-parte order which are:-

- 1. That, this honourable court be pleased to order an interim injunction/order of maintaining status quo ante against the parties in this instant Application pending hearing and determination of the preferred HC Appeal No 35/2022 emanating from Civil Case No. 10 of 2022.*
- 2. Costs to follow the event.*
- 3. Any other reliefs(s) this honourable court may deem fit and just to grant.*

The facts deponed in the applicants' affidavit goes that: the applicants are the appellants in the HC Civil Appeal No. 35 of 2022 and they were the plaintiffs in Civil Case No. 10 of 2022 before the Nyamagana District Court (trial court). Whereby, the hearing of the preliminary objection was heard ex-parte and hence ex-parte Ruling was entered after the applicants failed to appear on the date scheduled for hearing. The applicants in their affidavit complained that, the ex-parte hearing was erroneously procured and therefore the matter was not heard interparty.



Dissatisfied by the said Ruling, the applicants made the present application and on behalf of their advocate he deponed that, there is a great chance of the preferred appeal to succeed because of the apparent irregularity from the record in the sense that there was no issuance of summons for ex-parte hearing and no summons for ex-parte judgment and that, the trial court proceeded with hearing while, there was a notice of appeal against the Ruling delivered by the trial court.

It was further deponed that, the ex-parte hearing and the subsequent order was founded on bad blood developed by the trial magistrate after being denied severally to proceed in presiding over the matter in question. He finally deponed in his affidavit and urge this court to restrain parties temporary from acting whatsoever in relation to the claims in the trial proceedings pending determination of the appeal.

Upon being served with the application, the respondents raised three points of preliminary objection which are

- 1. That the application being based on an incompetent appeal is itself incompetent*
- 2. That as both the ex-parte and interparty prayers in the application are for interim orders not contemplating a temporary injunction, and not the subject of the grounds of appeal the application for interim orders has no basis and it is incompetent*



3. That paragraph 8 in applicants' affidavit is defective as it contained prayers.

After this court being satisfied that, the applicant was properly served with the notice of the points of preliminary objection, the matter proceeded by the hearing of the preliminary objection. During the hearing, the applicants were represented by Mr. Gibson Ishengoma while the Respondents were represented by Mr. Masound Mwanaupanga, both learned counsels.

The respondents' counsel was the one who started to submit on the raised points of preliminary objection and he chose to start with the third point of preliminary objection. He averred that, paragraph 8 of the affidavit contained prayer and therefore it is defective. He referred to the settled position of law that, affidavit should not contain prayers. He supported his argument with the case of **Msasani Peninsula Ltd & 6 others v Barclays Bank Tanzania Limited**, Civil Application No. 192 of 2006 which held that, affidavit should contain statement of fact and not prayers. He therefore asked paragraph 8 of the appellants' affidavit to be expunged as it contains prayer and should not form part of the affidavit.



When he was submitting on the first point of preliminary objection, he stated that, as the appeal itself is incompetent, the present application is also incompetent. He said that, the preliminary objection is based on Order IX Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019, and that the said Order is very clear that, a party who is aggrieved by the ex-parte judgment has to make an application to set it aside. He supported his argument with the case of **Magongo and Company Advocates v Elizabeth Mponzi (the administrator of the late Edward Mponzi)** Misc. Application No. 125 of 2019 and the case of **Capital Drilling (T) Limited v Said Hamad Hemed**, Civil Appeal No. 11 of 2009. He further cited the decision of the Court of Appeal in **Dangote Industries Ltd Tanzania v Warnercom (T) Limited**, Civil Appeal No. 13 of 2021.

On the second point of preliminary objection, he submitted that, the ex-parte and inter-parties prayers for temporary injunction, are not featured in the Civil Appeal No. 35 of 2022. He added that, the said prayers are baseless and incompetent. He prayed for the application to be struck out with costs.

In rebuttal, on the third point of objection, the counsel for applicants submitted that, paragraph 8 of the applicants' affidavit does not contain



prayer rather a narration of facts and even if it contained prayer, it does not affect the affidavit.

On the first and second points of preliminary objection, he averred that, it is unusual to discuss the competency of appeal while the appeal itself is not determined on merit as it is upon the court to determine whether the appeal is competent or not. He went on that, ex-parte order is appealable and that this court can issue any other order as it deem fit to grant.

Re-joining, the counsel for the respondents mainly reiterates what he had submitted in chief and added that, one cannot argue the present application without touching the Civil Appeal No. 35 of 2022. He finalized by praying the application to be struck out with costs, as the counsel for applicants did not distinguish the cases cited by him and he did not support with any authority to show that, the ex-parte order can be appealable. That marks the end of parties' submissions.

After hearing the parties' submissions, the only issue which is called for determination in this application at the moment is whether the points of preliminary objection raised by the counsel for respondents are meritorious.



In attempting the above issue, I will start by determining the first point of preliminary objection and if the need arise, I will proceed with the determination of the other points of preliminary objection.

On the first point of preliminary objection, it is the submissions of the respondents' counsel that, the application is incompetent as it emanated from the incompetent appeal. He referred to Order IX Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019 to say that, the party who is aggrieved by the decision which is passed ex-parte, if he wants to challenge it, he is firstly required to set it aside unless he appeals on merit of the decision which is passed ex-parte.

The above averment was strongly disputed by the appellants' counsel who submitted that, the ex-parte order is appealable and the court has power to make any other order as it deem fit. He added that, it is unusual to discuss the competency of appeal before it is finally determined.

It is the practice of the court that, once there is a preliminary objection the court should hear it and dispose it first, though this practice does not limit the court to hear both the preliminary objection and the substantive application altogether simultaneously. However, the court need to dispose the preliminary objection first. The practice of disposing the preliminary objection first has been emphasized by the Court of Appeal



of Tanzania in the case of **Khaji Abubakar Athumani vs Daudi Lyakugile T. A D.C Aluminium & Another**, Civil Appeal No.86 of 2018.

In determining the first point of preliminary objection, I revisited the applicants' affidavit sworn in by their learned counsel. On paragraph 5 of the affidavit, it was deponed that, being aggrieved by the decision of the trial court, the applicants appealed to this court and there is pending Appeal which is Civil Appeal No 35. of 2022. In paragraph 6 of the affidavit, it was deponed that, there is a great chance of the preferred appeal to succeed since there is apparent irregularity on the face of the record for the reason that, there was no issuance of summons for ex-parte hearing and no summons for ex-parte judgment and the trial court proceeded with hearing.

From the above two paragraphs as they are depicted from the applicants' affidavit sworn in by their counsel, it would appear to me that, the applicants seek to challenge the ex-parte judgement that was entered against them, as they alleged to have not been afforded a right to be heard as the summons were not issued to them, when the order of ex-parte hearing was made as well as no summons were issued to them when the ex-parte judgment was delivered. It is from this perspective is when the respondents' counsel raised a point of preliminary objection and



argued that the application is incompetent because it originated from the incompetent appeal and the remedy for ex-parte decision is to set it aside and not to bring an appeal as the applicant challenged the right to be heard.

It is a settled position of the law that, the party who is aggrieved by the ex-parte decision, and he challenges on the procedure of issuing the order of the ex-parte hearing and ex-parte decision, like in our case at hand, he is required first to apply to set aside the ex-parte decision. (See Order IX Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019 and the case of **Jaffari Sanya & Another vs Saleh Sadiq Osman**, Civil Appeal No. 54 of 1997, CAT at Zanzibar and the case of **Dangote Industries Ltd Tanzania v Warnercom (T) Limited**, Civil Appeal No. 13 of 2021). It is well know that, the order to set it aside has to be made by the same court which issued the ex-parte order. If the application to set aside the said ex-parte order is unsuccessful, then the aggrieved party may appeal against that decision to the higher court.

As I have earlier on noted, paragraph 6 of the applicants' affidavit, challenges the denial of a right to be heard as the procedure for ex-parte hearing and ex-parte decision was not followed. For that reason, it is my considered view that, the present application before me is incompetent as



the applicants took a wrong root to come to this court by way of appeal. As the appeal which is the backbone of this application is struck out for being incompetent, this application cannot stand.

For that reason, I will not labour myself to determine the remaining points of objection as first ground suffice to dispose of this application.

Consequently, I hereby struck out the Misc. Civil Application No. 80 of 2022 for being incompetent.

Costs to follow event.

It is so ordered



A handwritten signature in blue ink, appearing to be 'M. Mnyukwa'.

**M.MNYUKWA
JUDGE
29/09/2022**

Court: Ruling delivered in the presence of respondents' counsel and in absence of the applicants.

A handwritten signature in blue ink, appearing to be 'M. Mnyukwa'.

**M.MNYUKWA
JUDGE
29/09/2022**