

THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)
THE HIGH COURT
(IN THE DISTRICT REGISTRY OF MUSOMA)
AT MUSOMA

CIVIL APPEAL CASE No. 4 OF 2022

*(Originating from the Resident Magistrates' Court of Musoma at
Musoma in Misc. Civil Application No. 13 of 2021)*

BARTAZARY WAMBURA THOMAS APPELLANT

Versus

AYUBU JOSEPH RESPONDENT

JUDGMENT

23.11.2022 & 23.11.2022
Mtulya, J.:

On 19th September 2021, the **Resident Magistrate Court of Musoma at Musoma** (the court) in **Civil Case No. 13 of 2021** (the case) dismissed the case for want of prosecution under **Order VIII Rule 29 (a) and (b)** of the **Civil Procedure Code [Cap. 33 R.E 2019]** (the Code). **Mr. Bartazary Wambura Thomas** (the appellant) was not satisfied with the dismissal order hence preferred an application for restoration of the case in **Misc. Civil Application No. 26 of 2021** (the restoration application) in the same court.

However, the application was protested at preliminary stages, and was determined in favor of **Mr. Ayubu Joseph** (the respondent) and the court held that the appellant had filed the

application for restoration out of statutory time per requirement of the law enacted in **Order VIII Rule 30 (1)** of the Code. This citation of the law aggrieved the appellant hence rushed to this court complaining that the court grossly erred in law and fact for holding that the restoration application was filed out of time.

The application was scheduled for hearing in this court today afternoon and both parties decided to invite learned counsels, **Mr. Chiyengere Gaya Wandore** for the appellant and **Mr. Evance A. Njau** for the respondent to argue the appeal on their behalf. However, before the appeal hearing could take its course, this court *suo moto* noted undetermined issue on the interpretation of section **19 (1) of the Law of Limitation Act [Cap. 89 R.E. 2019]** (the law of limitation) which was brought by the appellant in the case via Applicant's Written Submission in Reply to the Respondent's Written Submission on Preliminary Objection.

Following the observation, the learned minds were invited to submit on the subject before appeal hearing as part of cherishing article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] and precedent in **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251. According to Mr. Chihengere, this court may order the court to resolve the issue so that it appears

and be part of the record whereas Mr. Njau thinks that the issue on interpretation of section 19 (1) of the law of limitation is reflected in the Written Submissions of the parties, but the court had declined to determine it because it is a general provision in general law that cannot be invited where there is specific provision of the law in **Order VIII Rule 30 (1)** of the Code.

In my opinion, I think, it is settled law that undetermined issues at lower courts or tribunals cannot be determined at appellate level. There is a bunch of precedents on the subject determined by the Court of Appeal (see: **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi**, Civil Appeal No. 98 of 2018; **Alnoor Sharif Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 and **Celestine Maagi v. Tanzania Elimu Supplies (TES) & Another**, Civil Revision No. 2 of 2014). Similarly, this court has been cherishing the move (see: **Nyamatoma Frugence v. Hekwe Kitagita**, Misc. Land Appeal Case No. 117 of 2021; **FINCA Tanzania Limited (Tarime Branch) v. Omary Manyara Mkuge & Another**, Land Appeal Case No. 123 of 2021; and **Manyinyi Weswe v. Malibha Nyonyi**, Misc. Land Appeal Case No. 34 of 2022).

Having noted Mr. Njau is admitting that there is unresolved issue in the restoration application, I agree with learned counsel **Mr. Chihengere** that the issue has to be remitted to the court for

determination. In the end, I quash both the judgment and decree of the court. I further remit the record to the court to compose fresh judgment that will comprise replies to all raised issues in the submissions. I do so without any order as to the costs as the fault was caused by the court, not the parties. In any case, the undetermined issue was raised by this court *suo moto* and the dispute is in the course at the court. The determination and composition of the fresh and proper ruling be done by the same magistrate and completed within sixty (60) days from the date of this judgment, without any further delay.

Ordered accordingly.




F. H. Mtulya

Judge

23.11.2022

This judgment was delivered in chambers under the seal of this court in the presence of **Mr. Chiyengere Gaya Wandore**, learned counsel for the appellant and in the presence of **Mr. Evance A. Njau**, learned counsel for the respondent.


F. H. Mtulya

Judge

23.11.2022