

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

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**PC CIVIL APPEAL NO. 33 OF 2021**

*(Arising from the decision of the District Court of Musoma at Musoma in Misc. Civil Application No. 11 of 2021)*

**BETWEEN**

**MUSA MUYENJWA.....APPELLANT**

**VERSUS**

**MAINGU MALIBWA..... RESPONDENT**

**JUDGEMENT**

*9<sup>th</sup> & 25<sup>th</sup> November, 2022.*

**M. L. KOMBA, J.:**

This appeal traces its origin from the decision of the District Court of Musoma at Musoma in Misc. Civil Application No. 11 of 2021 where appellant applied for enlargement of time so that he can appeal against the decision of the Primary Court in Civil Case No. 46 of 2020. In his application for extension of time it was alleged that, the appellant wrongly cited enabling provision which trigger the respondent herein to file preliminary objection on wrong citation of law.

Traditionally, when there is preliminary objection it must first be determined, the district court overruled the preliminary objection and determined the

application on merit. The decision of the District Court was not well accepted by the appellant herein hence this appeal with only one ground that;

*'The trial Magistrate erred in law to dismiss the miscellaneous Civil Application No. 11 of 2021 instead of struck out the application for the wrong citation of the law.'*

When the appeal was called for hearing, the appellant hired the service of Mr. Christopher Waikama, while Ms. Suzana Jacob represented the respondent both being an Advocates.

When given time to make the ball rolling, Mr. Waikama submitted that the respondent was dissatisfied by the decision of the District court as the Magistrate misdirected himself for dismissing the application instead of struck out and insisted that it is settled when the application bears wrong citation the court is supposed to struck out. He further elaborated the effect of dismissing the application which was not heard, the applicant cannot be given right to be heard. Explaining further that the issue was technical and not legal which could allow the court to dismiss.

On a different note, counsel for the appellant complained that the Magistrate determined the Preliminary Objection and the merit of the application on the

same day, according to him, though he did not provide any authority, he said that was not proper as the applicant was not given time to address the court on the application for extension of time. He lamented that the Magistrate continued *suo motto* to determine application and pray this court to find that was not proper and instead his prayer is for this court to quash the dismissal order.

Responding to the submission, Ms. Suzana informed the court that the appellant filed only one ground of appeal which in responding the same she agrees with the decision of the District Magistrate to dismiss the application because the appellant failed to account for each day of his delay. She pointed out that the counsel for the appellant is trying to mislead the court by assertion that the dismissal was due to wrong citation while not. It was her argument that the objection on wrong citation was overruled and the application was determined on merit. Ms. Suzana supported her submission by referring to page 6 of the judgement where the District Magistrate overruled the objection and at page 9 the Magistrate explain reasons for the dismissal and that both parties had opportunity to be heard. She finalized by praying the appeal to be dismissed with costs.

In rejoinder, Mr. Waikama did not have much to say than insisting that this court will verify issues from the records of lower court and prayed the appeal be allowed basing on the grounds as supplied by the appellant.

Having heard counsel for both parties, the issue for determination before this court is weather the appeal has merit.

The appellant filed only one ground of appeal as reproduced in fore-paragraph but in his submission, he argued and discuss the issue that the trial Magistrate determined application without avail time to the applicant to address the court. According to him the application was heard *suo motto* and argue this court to find that was not proper and quash the dismissal order.

At this juncture, I find it pertinent to restate the principle of law that parties are bound by their own pleadings. The court is commanded to ignore any evidence which does not support the pleaded facts or is inconsistency with the pleaded facts. See **Charles M. Mbusiro Vs John Bunini**, Land Appeal NO. 6 OF 2021 TZHC 6293. The position was set by Court of Appeal way back in the case of **James Funke Ngwagilo v. Attorney General** [2004] TLR 161 that:

*'If seems necessary to restate certain principles regarding pleadings. The function of pleadings is to give notice of the case which has to be met. **A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree**, thereby identify with clarity the issues on which the Court will be called upon to adjudicate to determine the matters in dispute. **If a party wishes to plead inconsistent facts, the practice is to allege them in the alternative and he is entitled to amend** his pleadings for that purpose. "(Emphasize supplied).*

The bolded expression shows that the pleadings are intended to avoid surprises in court. Unless the pleadings are amended, either party to the case is barred from raising a different case. For that purpose, this court will only analyse one ground of appeal as pleaded by the appellant.

It is true that there was a preliminary objection over wrong citation of the law as presented by Mr. Waikama. Judgement which is subject of this appeal was delivered on 26 June, 2021 by District Court of Musoma at Musoma in Misc. Civil Application No. 11 of 2021. Reading careful the judgement as appended by the Appellant, I find at page 6 the following paragraph;

*'Therefore, due to the submission of the applicant against the preliminary Objection raised by the respondent, this honorable court **overrules the preliminary objection** raised by the respondent.'*

From that passage, it is clear that preliminary objection over the wrong citation was determined and it was overruled. On the same page Hon. Magistrate started to analyze the prayers as raised by the appellant which were concluded at page 8 -9. Part of judgement reads;

*'I do not see any reasonable ground for the application for appeal from the date the judgement was delivered that was on 28 January, 2021. In any case, the applicant must account for every day of delay; unfortunately, **this court is not satisfied by the reasons given by the applicant. This is because the applicant did not account for each day since he had time to file an application.** If the judgement was delivered on 28<sup>th</sup> January, 2021. And he was taken to the witch doctor on 25 February, 2021 so he had time to do so. And for the second and third Players, it is hereby ruled out because of the first prayer to be denied before this court.'*

It is on apparent face of record that Hon. Magistrate analysed grounds forwarded by the applicant in the application and determined it in merit. He went further to provide reasons for his decision as it is required by Order XX Rule 4 of the Civil Procedure Act, Cap 33 R. E. 2019. By this analysis, I join hands with Ms. Suzana and in fact it is true that application was determined



on merit and was actually dismissed. This was the proper way of dealing with application which was determined. The dismissal was not due to wrong citation rather, was to the merit of the application.

To that end and to the above extent, this appeal has no merit and it is hereby dismissed with costs.

Dated in **MUSOMA** this 24<sup>th</sup> Day of November, 2022.


**M. L. KOMBA**

**Judge**

Judgment delivered this 25<sup>th</sup> day of November, 2022 in the presence of the respondent.

Right of appeal explained.



  
**E. R. Marley**  
**Ag. DEPUT REGISTRAR**  
**25<sup>th</sup> November, 2022**