

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL APPEAL NO. 224 OF 2020

ALEX DAUDI CHIBUNU APPLICANT

VERSUS

SERAPHINE KAMARA 1ST RESPONDENT

KINONDONI MUNICIPAL COUNCIL 2ND RESPONDENT

DAR ES SALAAM CITY COUNCIL 3RD RESPONDENT

**(Appeal from the decision of the District Court of Kinondoni
in Misc. Civil Application No. 219 of 2019)**

JUDGMENT

18th and 21st March, 2022

KISANYA, J.:

This appeal centres on the proper recourse in respect of an omnibus application or application preferred under wrong provision of the law. The District Court of Kinondoni at Kinondoni (henceforth "the trial court) determined that issue by dismissing the application.

For better understanding of the context in which this appeal has arisen, I find it apt to narrate the material facts of the case as below. The appellant, Alex Daudi Chibunu applied before the trial court seeking extension of time within which to apply for stay of execution of the ex-parte decree made in Civil Case No. 15 of 2001 pending hearing of an application for extension of time to set aside the ex-

parte judgment. The first respondent, Seraphine Kamara filed a notice of preliminary objection on the points of law to the effect that:-

1. The affidavit in support of the application was defective;
2. The application was brought under wrong citation or non-citation of the enabling provisions of law; and
3. The application contained omnibus prayers.

After hearing the parties, the trial court sustained the second and third points of preliminary objection. The learned Senior Resident Magistrate who heard the matter went on to dismiss the application. The relevant part of the ruling of the trial court is quoted hereunder:-

*“With the above pertinent legal observation in mind, I have reached to the conclusive findings that the application brought before the court lacks vigilance in its interpretation, and therefore it has no merit before the court hence **Dismissed with costs.**”*

Undeterred, the appellant came to this Court on an appeal with two grounds of appeal. However, one ground of appeal was abandoned. The remaining ground reads:-

That the sustained preliminary objection on the point of law being that of wrong citation and omnibus application to the ruling in question, the trial court erred in and in fact in making the dismissal remedy instead of striking it out.

At the hearing of this appeal, the appellant was also represented by Mr. Emmanuel Hyera, learned advocate. On the other side, Dr. Rugemeleza Nshala, learned advocate appeared for the 1st respondent. The hearing proceeded in the absence of the 2nd and 3rd appellant who defaulted to appear without notice.

The appeal was not contested by Dr. Nshala. He submitted the trial court erred in dismissing the application instead of striking out the same. Both parties were also in agreement that the appeal be allowed without costs.

Having considered the submissions made by the learned counsel for both parties, the issue for determination is whether the dismissal order was properly entered by the trial court.

It is common ground that the trial court dismissed the application after sustaining the preliminary objections to the effect that the application had been made under wrong citation of law and that it was omnibus. In that premises, I agree with the learned counsel for the parties that the proper recourse was for the trial court to strike out the application for being incompetent. The law is settled that the word "dismissal" connotes that the matter is competent before the court and that it has been determined on merit. This stance was stated in the case of **Ngoni- Matengo Cooperative Marketing Union Ltd. vs Alimahomed Osman** (1959) EA 577 when the erstwhile East African Court of Appeal held that:

..... 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 strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of.

In the instant appeal, the trial court did not hear and determine the application on merit. The sustained objections as to wrong citation of enabling provisions of the law and omnibus prayers rendered the application before the trial court incompetent. Therefore, in view of the settled law, the trial court ought to have made an order striking out the said application. See for instance, the case of **Cyprian Mamboleo Hiza vs. Eva Kioso and Another**, Civil Application No. 30 of 2010 (CAT unreported), in which the Court of Appeal had this to say on the issue under consideration:-

"...This court, accordingly, had no jurisdiction to entertain it, what was before the Court being abortive and not properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of."

Guided by the above position, I am satisfied that the appeal the appeal is meritorious. This is when it is considered that the dismissal order passed by the trial court had the effect of barring the appellant from lodging a competent application before the same court.

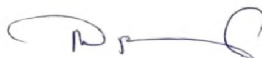
In view of what I have endeavored to discuss, the appeal is hereby allowed. The dismissal order entered in the ruling and drawn order of the trial court is hereby quashed and set aside and substituted with an order of striking out the application. As the parties are not to be blamed for the anomaly, I do not make any order as to costs.

DATED at DAR ES SALAAM this 21st day of March, 2022.



S.E. Kisanya
JUDGE

Court: Ruling delivered this 21st day of March, 2022 in presence of the appellant in person and Dr. Rugemeleza Nshala, learned advocate for the 1st respondent and in the absence of the 2nd and 3rd respondents.



S.E. Kisanya
JUDGE
21/03/2022

