

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

(PC) CIVIL APPEAL NO. 53 OF 2020

(C/F Babati District Court at Babati in Misc. Civil Application No. 7 of 2020 and Misc. Civil Application No. 6 of 2020, Originated from Civil Case No. 2 of 2020 at Gallapo Primary Court)

GABRIEL FRANCIS.....APPELLANT

VERSUS

RAMADHANI ISSA..... RESPONDENT

JUDGMENT

21.03.2022 & 05.04.2022

N.R. MWASEBA, J.

The appellant, Gabriel Francis, sued the respondent Ramadhani Issa at Gallapo Primary Court claiming for Tshs. 29, 977,500/= (Twenty-nine million, nine hundred seventy-seven thousand, five hundred) being the cost for representing him in his case. After a full trial, the court entered judgment in favour of the appellant herein and ordered the respondent to pay the appellant the said amount. Aggrieved, the respondent

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preferred an appeal to the district court. However, as he was out of the prescribed time, he filed an application for extension of time via Misc. Civil Application No. 6 of 2020 in order to file an appeal out of time.

The said application was dismissed with costs on 23.06.2020 for non-appearance of the applicant (respondent herein). Thereafter, the respondent filed another Misc. Civil Application No. 7 of 2020 for the court to readmit the Misc. Civil Application No. 6 of 2020 which was dismissed for non-appearance on the 23rd day of June, 2020 and be heard to its finality. After the hearing, the court was satisfied with the reasons adduced by the respondent herein (applicant by then) for his non-appearance and restored Misc. civil Application No. 6 of 2020.

Aggrieved, the appellant (respondent by then) filed the present appeal armed with five grounds of appeal as depicted from his Petition of Appeal.

At the hearing of the appeal both parties appeared in person, whereby the matter proceeded orally.

Supporting his appeal, on the first ground the appellant told the court that the trial court erred in law to readmit Misc. Civil Application No. 6 of 2020 as the respondent (applicant by then) used an improper provision to move the court to grant his prayer. It was his submission that, this

court disregards the said application and makes an order for the respondent to file a proper application as he was supposed to file an application to set aside the dismissal order instead of asking for restoration of the application which was already dismissed.

As for the second ground, the appellant submitted that the trial court did not consider his evidence despite being stronger than that of the respondent. Moreover, the trial magistrate disregarded his evidence and supported the respondent with his incompetent application.

Coming to the third ground, the appellant told the court that on the ruling delivered at the trial court it was alleged that the respondent filed an application to set aside the dismissal order and he was within the prescribed time while the applicant (respondent herein) never instituted such kind of application and to-date he is out of the prescribed time to file an application to set aside the dismissal order of Misc. Civil Application No. 6 of 2020.

As for the fourth ground, the appellant complained that it was wrong for the trial court to receive a hospital report which shows the respondent was admitted at hospital on 23.06.2020.. It was his further submission that, the Misc. Civil Application was dismissed due to non-appearance of other days apart from 23.06.2020 and the respondent failed to explain

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his whereabouts on those days. In the end, he submitted that, the respondent failed to prove that he had a sufficient reason for his non-appearance leading to the dismissal of Misc. Civil Application No 6 of 2020.

Coming to the fifth ground, the appellant alleged that the respondent was supposed to file an application to set aside the dismissal order and not an application for restoration as he did. He added that, for the justice to be done, this court needs to set aside the decision given in Misc. Civil Application No. 7 of 2020 where the rights of the appellant were jeopardized. Moreover, he prayed for the appeal to be allowed with costs as the respondent started to disturb him when he filed the application for execution while he was relaxing for the rest of the time.

Opposing this appeal, the respondent argued that this appeal is void of merit as he was not given his right to be heard at Gallapo Primary Court. He added that the appellant stole his documents in his house and started to disturb him and the people who were using his farm. At the trial court, the trial magistrate was right to grant his application as he was hospitalized when the application was dismissed on 23.06.2020.

Further to that, the respondent told the court that falling sick at that moment was not his choice as everyone is subject to falling sick at an

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unpredicted time. So long as the application was not determined on merit it was not right for the appellant to file the present appeal, therefore, he prayed for the Application No. 6 of 2020 to be restored so that he can be free to state his case.

In his brief rejoinder, the appellant told the court that the Civil Case No 2 of 2020 before the primary court was determined *inter partes*. He states that the respondent has failed to challenge his submission in chief so he prays for his submission to be considered.

Having considered the arguments by both parties and the records of this matter, the decision which the appellant is appealing for is the grant of an application to readmit the Misc. Civil Application No 6 which was dismissed for non-appearance. Therefore, the main issue for determination in light of those grounds of appeal is whether this appeal is competent before this court.

Before going further, the respondent told the court that as the suit was not yet determined on merit, then the respondent cannot appeal against such a decision. Thereafter, this court asks itself if the decision appealed for was an interlocutory one or not as alleged by the respondent and whether it is appealable.



Section 74(2) of the Civil Procedure Code (Cap 33 R.E 2019), provides:

*" Notwithstanding the provisions of subsection(l), No appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrates Court or any other tribunal, **unless such decision or order has effect of finally determining the suit.**"* (Emphasis added)

The same was clarified in the case of **Junaco (T) Ltd and Justin Lambert vs Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 C.A Dar es Salaam at page 12 to 13, the Court had this to say:

"In order to know whether the order is interlocutory or not 'the nature of the order test' must be conducted that is, did the order or the judgment complained of finally dispose of the rights of the parties."

Based on the cited authorities and looking carefully at the ruling and order of the trial court sought to be appealed for, it is my considered view that it is an interlocutory order, because it does not finally determine the rights of the parties. The trial magistrate restored the

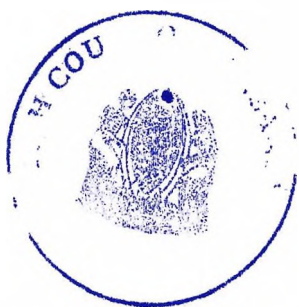
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Misc. Civil Application No. 6 of 2020 so that it might proceed from the stage it had been stopped. For that matter, the order is not appealable as it has no effect on finally determining the main application on merit. In this regard, the appellant was supposed to wait until the determination of the Civil Application No. 6 of 2020 instead of appealing on an interlocutory order which has no effect on determining the rights of parties.

It is my considered view that this appeal is brought prematurely and thus not maintainable before this court as the order appealed for is an interlocutory one. The decision for restoration of the dismissed application did not finally determine the rights of the parties. Therefore, the appeal is hereby dismissed with costs, because it flouts the provision of **Section 74(2) of the Civil Procedure Code** (Cap. 33 R.E. 2019).

Ordered accordingly.

DATED at **ARUSHA** this 5th day of April, 2022.




N.R. MWASEBA

JUDGE

05.04.2022