

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 140 OF 2022

REGAN KISAKEN NGOWO.....APPLICANT

VERSUS

GLORY JEROBOAM MBOYA.....RESPONDENT

RULING

Date of last Order 08th Dec, 2022

Date of Ruling 17th February, 2023

E. E. KAKOLAKI J

This ruling seeks to address the preliminary points of objection raised by the respondent pressing this Court to dismiss the application with costs on two grounds that, the application has been misconceived hence bad in law and that, the application is purely frivolous and vexatious and therefore subject the Respondent to time wastage and unnecessary costs.

Briefly the applicant herein under section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2019] and section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) filed the present application praying this Court to grant him extension of time within which to file application for admission of appeal out of time. The application was preferred following dismissal of applicant's

appeal by this Court on 01/06/2021 in Civil Appeal No. 29 of 2021, for want of prosecution. However before the same was scheduled for hearing the respondent filed with the Court a notice of preliminary objection on two grounds as alluded to above questioning competence of the said application.

As a matter of practice parties were to be heard first on the raised points of objection and the matter proceeded by way of written submission. The applicant traded under legal aid from Legal and Human Rights Centre while the respondent represented by Mr. Wiston Mosha, learned advocate.

In this ruling I am prepared to address and determine one ground after another. Submitting in support of the first point of objection Mr. Mosha contended that, this application is misconceived hence bad in law, as the applicant is seeking an extension time to file an application for admission of appeal in contravention of the provision of Order XXXIX Rule 19 of the CPC which provides for procedure on re-admission of appeal. He said once the appeal is dismissed for want of prosecution the remedy is to apply for re-admission and when the time to apply for re-admission is out then the proper procedure to take is to apply for setting aside the dismissal order and not to lodge a new appeal as the applicant is intending to do. According to him since the application before this Court is for extension of time within which

to apply for admission of appeal then the same is improperly before the Court, thus bound to be dismissed and so prayed.

On his side the applicant vehemently resisted the objection arguing that in dismissed appeal the remedy is not to go for setting aside the order as under Order XXXIX Rule 19 of the CPC as rightly quoted by the respondent the right remedy is to apply for its re-admission. In view of that position of the law, the applicant submitted that, this Court has power to entertain the application for the interest of justice, hence the preliminary objection be found unmerited and dismissed with costs.

I have dispassionately considered the submission by the parties as well as going through the chamber summons to establish validity of the point of objection concerning the applicant's prayer under attack. The issue for determination by the Court therefore is whether the prayer by the applicant for extension of time to file an application for admission of appeal is misconceived and therefore bad in law as claimed by the respondent. To respond to the issue, it is undisputed fact that the applicant's appeal in Civil Appeal No. 29 of 2021 was dismissed by this Court for want of prosecution on 01/06/2021 and that, the only available remedy for him is to apply for its re-admission as provided under Order XXXIX Rule 19 of the CPC which reads:

19. Where an appeal is dismissed under sub-rule (2), of rule 11 or rule 17 or rule 18, the appellant may apply to the Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit. (Emphasis supplied)

In this matter both parties are at one that, having found himself out time applicant ought to have applied for extension of time to apply for re-admission of the appeal as dictated in the above cited provision of the law. He however opted to file this application with the following prayers and I quote:

- 1. That, this Honourable Court be pleased to grant extension of time within which to file application for admission of appeal out of time.*
- 2. Any other relief this Court deem proper to grant.*

While the applicant is admitting in his admission that the remedy for a dismissed appeal is to apply for its re-admission under Order XXXIX Rule 19 of the CPC, in the above prayer is praying for extension of time to file an application for admission of the dismissed appeal out of time and not its re-admission. This fact forces me to embrace respondent's submission that by

applying for extension of time to apply for admission of the dismissed appeal out of time and not re-admission, the application is misconceived and therefore bad in law. Even where I was to agree with the applicant and proceed to hear the application on merit, which I am not, the prayer if granted would be for extension of time to apply for admission of the dismissed appeal as prayed, the order which no doubt would be in contravention of the provision of Order XXXIX Rule 19 of the CPC as this Court will not be able to entertain the application for admission of the dismissed appeal.

In the premises and for the fore stated reasons, I find merit in the Respondent's first preliminary objection and uphold it as the application by the applicant for extension of time to apply for admission of the dismissed appeal instead of its re-admission, is misconceived and therefore bad in law. Since this ground suffices to dispose of the application, I see no reason to go for the second point of objection, for being an academic exercise which I am not prepared to venture into.

Since the application is bad in law the same is incompetent and therefore the respondent's prayer for its dismissal is untenable as an incompetent matter cannot be dismissed for not being heard on merit but rather struck

out. See the case of **Cyprian Mamboleo Hiza Vs. Eva Kioso and Another**, Civil Application No. 30 of 2010 (CAT unreported). With that legal stance in place, this application stands struck out.

As the same originates from matrimonial cause this Court deems it fit to order each party to bear its own costs.

It is so ordered.

Dated at Dar es salaam this 17th day of February, 2023.



E. E. KAKOLAKI

JUDGE

17/02/2023.

The Ruling has been delivered at Dar es Salaam today 17th day of February, 2023 in the presence of Mr. Wiston Mosha, advocate for the respondent and Ms. Tumaini Kisanga, Court clerk and in the absence of the applicant.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

17/02/2023.

