

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

**Misc Civil Application NO. 558 OF 2022  
(Originating from Civil Case No.12 of 2004)**

**STELLA MAEDA.....1<sup>st</sup> APPLICANT**

**MUSTAFA OMARI .....2<sup>nd</sup> APPLICANT**

**VERSUS**

**MULT TRAVEL AND TOURS LIMITED .....RESPONDENT**

**RULING**

*24<sup>th</sup> & 28<sup>th</sup> February 2023*

**MKWIZU, J.:**

The information gathered from the records reveals that applicants STELLA MAEDA and MUSTAFA OMARI stand as defendants in civil case No 12 of 2004 for dishonesty and related matters. The suit was however dismissed for want of prosecution in September 2017. Respondent (Original plaintiff in the main case) successfully filed an application to set aside the said dismissal. Unpleased, the applicants filed a notice of appeal to the Court of Appeal coupled with an application for leave to appeal. Their application for leave was struck out by the COURT on the ground that it ought to have been made before the High court first.

Being time-barred, the applicants are now before this court seeking for enlargement of time to file an application for leave to appeal to the Court of Appeal of Tanzania against the decision of Hon Justice Mgonya J dated 15/6/2021. The application is supported by two affidavits sworn by the

applicants on 18<sup>th</sup> December 2022. The application was resisted by the respondent, MULT TRAVEL AND TOURS LIMITED who is also the plaintiff in the main suit.

When the matter came first for hearing on 14/12/2022, Mr. Jumbe Abdallah advocate appeared in court holding the brief of Professors Safari for the applicants and also for Mr. Romani Thelathinin advocate for the Respondent. The matter was however on that date scheduled to proceed through written submissions.

Having gone through the affidavits and the parties' submissions the court found it pressing to look first at the validity of the matter before the court. This choice is instigated by the nature of the decision that the applicant was intending to challenge to the Court of Appeal in case the application for leave is ultimately allowed. Parties were thus recalled address the court on the issue of whether the order of this court (Mgonya J) setting aside the dismissal order is appealable so as to accommodate the present application by the applicants.

Prof. Safari for the applicants was of the view that the impugned decision is appealable with the leave of the high court under section 5 (1) (c) of AJA while Mr. Roman Thelathin Lamwai said it is not appealable because the decision did not finalize the matter in dispute. He was of the view that if applicants are granted an extension of time, they will automatically go for leave to appeal which is only reserved for the matters that are appealable and not otherwise. He lastly urged the court to strike out the application for being incompetent.

There is no doubt that section 5 (2) (d) of the AJA bars an appeal or revision in respect of any preliminary or interlocutory. Paragraph (d) of section 5 (2) of the AJA provides:

*"No appeal or application for revision shall lie against or be made in respect of any **preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit**"( emphasis added)*

The above provision has been interpreted by the Court of Appeal in its various decisions as barring an appeal or application for revision against interlocutory decisions or orders which do not have the effect of finally determining the suit. See for instance the case of **Murtaza Ally Mangungu v. The Returning Officer of Kilwa & Two Others**, Civil Application No. 80 of 2016(unreported.). And the test as to whether the decision or order is final, preliminary, or interlocutory was considered in the case of **Tanzania Motor Services Ltd & Another v. Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2006; Quoting with approval the English decision in **Bozson v. Altrincham Urban District Council** [1903] 1KB 547 at page 548 where it was observed that;

*"It seems to me that the **real test for determining this question ought to be this**: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think **it ought to be treated as a final order**; but **if it does not, it is then, in my opinion, an interlocutory order.**"*

It is evident that the applicant's intended appeal emanates from the order by Mgonya J, allowing an application to set aside a dismissal order. It is obvious therefore that, that order did not finally decide the parties' rights. This is so because, normally when a dismissal order is set aside by the court, the main case is reinstated, the parties are put back in the positions they were prior to the dismissal order, and the main case is reopened for its determination from where it ended before the dismissal order. Parties are then given an opportunity to be heard and have all their grievances resolved before a final decision is made. This is exactly what happened in this case. The records are clear that after the setting aside of the dismissal order on 15/6/2021 this court, (Mgoja J) did direct the main suit to proceed on merit, Party of her order says:

*"...this application is granted.*

*In the event therefore the dismissal order dated 4/9/2017 is hereby set aside and **I direct that the matter proceed for hearing on merit**" ( bold is mine)*

The hearing of the main suit was blocked by the applicant's move in filing a notice of appeal and application for leave to the Court of Appeal followed by this application.

Guided by the above legal position, this court is convinced that the impugned order is purely interlocutory, and therefore not appealable. Any criticism against the doubted interlocutory order ought to have been raised in an appeal against the final decision and not otherwise. This is what the applicant ought to have done.

It should be restated here that, before this court, is an application for an extension of time to file leave to appeal against what I have just concluded

to be an interlocutory order. As rightly submitted by Mr. Roman Thelathini, if time is to be extended, applicants will automatically go for leave to appeal under section 5(1) (c) of the Appellate Jurisdiction Act which is only reserved for the matters that are appealable under section 5 (2) (d) of AJA which bars appeal on interlocutory orders. It will, in my view, serve no purpose to determine a prayer for a party to do something which is not legally permitted.

That said, I find the application incompetent and proceed to strike it out with costs.

**DATED at Dar es salaam this 28<sup>th</sup> day of February 2023.**



**E.Y. MKWIZU  
JUDGE  
28/02/2023**

