

**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. 144 OF 2022**

**NOVATUS RAYMOND ..... APPELLANT**

***VERSUS***

**LUCIANA STANLEY ..... RESPONDENT**

**(Appeal from the decision of the District Court of Kinondoni at Kinondoni in  
Civil Appeal No. 12 of 2022)**

**RULING**

14<sup>th</sup> December, 2022 & 17<sup>th</sup> February, 2023

**KISANYA, J.:**

The appellant, Novatus Raymond was aggrieved by the decision of the Primary Court of Kimara in Civil Case No. 2014 of 2021 in which he was ordered to pay the respondent, Luciana Stanley, a sum of TZS 2,800,000/=. He appealed to the District Court of Kinondoni at Kinondoni in Civil Appeal No. 12 of 2022.

In its decision dated 25<sup>th</sup> August, 2022, the District Court varied the decision of the trial court by holding that the appellant was liable to pay TZS 2,180,000/= being the total value of two refrigerators, one water tank (sim tank) and one blender machine which he took from the respondent.

Still aggrieved, the appellant filed the present appeal to challenge the decision of the District Court. His appeal was by a memorandum of appeal lodged in this Court on 30<sup>th</sup> September, 2022.

Upon being served, the respondent filed a notice of preliminary objection containing on point of law to the effect that the appeal is time barred.

When the appeal came up for orders on 21<sup>st</sup> November, 2022, parties prayed the preliminary objection to be disposed of by way of written submissions. This Court granted the prayer. In addition to the preliminary objection, parties were asked to address the Court on whether the appeal was properly filed before it. Parties were given schedule within which to file the written submissions for and against the preliminary objection.

Submitting on the issue raised by the Court, Mr. Ndanu Emmanuel, learned counsel for the appellant conceded that the appeal was filed to this Court. He also conceded that, the appeal was not properly filed in view of section 25(3) of the Magistrates' Courts Act, Cap. 11, R.E. 2019 (the MCA). He pointed out that the appeal ought to have been filed at the District Court of Kinondoni which was required to transmit the same and the record thereto to this Court. The learned counsel went on praying to withdraw the appeal with leave to refile it at the District Court of Kinondoni in order to save time of applying for extension of time. In alternative, Mr. Emmanuel urged this Court to refer the file to the Deputy Registrar

in order for the latter to exercise her power under section 26 of the MCA. He further prayed that the costs be waived as the issue was raised by the Court, *suo motto*.

On the other hand, the respondent submitted the appeal was incompetent for being filed to this Court in contravention of section 25(3) of the MCA. It was her further submission that the appeal is time barred. On that account, the respondent was of the view that the proper recourse is to strike out the appeal on the argument that an incompetent matter cannot be withdrawn. To bolster her argument, the respondent cited the case of **Terrazo Pavions Limited vs 3. Ladwa (1977) Limited**, Civil Application No. 63 of 2012 (unreported). It was her further submission that an incompetent matter cannot be salvaged by the principle of overriding objective.

Rejoining, the Mr. Emmanuel submitted that the appeal was not incompetent. His submission was based on the ground that this Court has mandate to determine the appeal. He reiterated his submission in chief and urged the court to consider the overriding objective under section 3A (1) and (2) and 3B (1) and (2) of the CPC.

Having heard the submissions by the parties, it is common ground the appeal was improperly filed before this Court. Pursuant section 25(3) and (4) of the Magistrate Courts' Act, Cap. 11, R.E. 2019 (the MCA), the appellant ought to

have lodged a petition of appeal in the District Court Kinondoni which passed the decision subject to the appeal. The District Court was then required to dispatch it to this Court, the petition of appeal together with the record of the proceedings in the primary court and the district court.

Now that the appeal was not lodged in the District Court, this Court has no record of the first appellate court and trial court. For that reason, I agree with the respondent that the appeal is incompetent for contravening the mandatory provision of section 25(3) and (4) of the MCA. I am also fortified by the decision of this Court in the case of **Athumani Nyambilile Ngombile Vs Rose Halifa Kiteti**, PC Civil Appeal No. 73 of 2022, HCT at DSM (unreported).

On the way forward, it is settled law that an incompetent matter cannot be withdrawn, amended or adjourned and that the proper remedy is to strike out the same. Apart from the case of **Terrazo Paviers Limited (supra)**, referred to the Court by the respondent, this position was stated in the case of **Ghati Methusela vs Matiko Marwa Mariba**, MZA Civil Application No. 6 of 2016 (unreported) where the Court of Appeal underlined that:

*"It is now established that an incompetent proceeding, be it an appeal, application, etc., is incapable of adjournment, for the court cannot adjourn or allow to withdraw what is incompetently before it."*

In the light of the foregoing position, the appellant's prayer for withdrawal of the appeal and determination of the appeal or reference of the case file to the Deputy Registrar cannot be granted. Considering further that the appeal was filed in contravention of the mandatory provision of law, I am of the view that it cannot be salvaged by employing the principle of overriding objective. The proper recourse is to strike out the appeal.

It is my further opinion that the preliminary objection which give rise to the issue whether the appeal is timeous can be determined if the appeal is competent before the court. Having decided the appeal was not properly filed before this Court, I find it not necessary to determine whether the preliminary objection is meritorious or otherwise.

In conclusion, the appeal is hereby struck out for the reasons stated afore. As the appeal is decided basing on the issue raised by the Court, *suo motto*, I make no order as to costs.

DATED at DAR ES SALAAM this 17<sup>th</sup> day of February, 2023.



S.E. KISANYA  
**JUDGE**

