

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

**MISC CRIMINAL APPEAL NO. 189 OF 2022**

**(Arising from Misc. Criminal Application No.34 of 2022 of the  
resident Magistrate Court of Dar es Salaam, at Kisutu)**

**PAUL JOHN MUHOZYA..... APPELLANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT  
THE DIRECTOR OF CRIMINAL INVESTIGATION.... RESPONDENT**

**RULING**

*8<sup>th</sup> March & 28<sup>th</sup> April 2023*

**MKWIZU, J**

This is an appeal against an order by the Resident Magistrate Court of Dar es Salaam at Kisutu in Misc. Criminal Application No 34 of 2022. In that original matter, Paulo John Muhoza approached the court asking it to order the 1<sup>st</sup> respondent to prosecute the minister for lands, Housing, and Urban Settlement Development for abusing her powers, Rugambwa Banyikila and Salum, Temeke Municipal officers for disobeying courts injunction issued in respect to a property located at Kingowe Mzinga area within Temeke District in Dar es Salaam. That application was struck out for being incompetent.

Unpleased with the findings, the appellant filed this appeal predicated on 18 grounds of appeal. In response to the appeal, the respondent filed a preliminary objection predicated on the following grounds: -

- 1. The court lacks jurisdiction to determine the matter.*
- 2. The appeal has been brought without serving a proper party.*

The State Attorney's arguments on ground one of the preliminary objections are to the effect that the appropriate remedy after the striking out of the application at the trial court was for the appellant to refile the application in a proper forum but not appeal. To bolster her argument, the learned State Attorney cited the cases of **Cyprian Mamboleo Hizza V Eva Kioso and Mrs. Semwaiko**, Civil Application No 3 of 2010 (unreported).

Submitting in support of the second preliminary point, the learned State Attorney said, under section 9 of the CPA the DPP is mandated to institute and deal with the prosecution of criminal matters while the 2<sup>nd</sup> respondent's powers under section 16 of the CPA are related to the investigation of all criminal complaints and therefore, cannot be proper parties in a case related to land matters. She urged the court to strike out the appeal.

Responding to the points, Mr. Paul John Mhozya contested the argument that his appeal is a land matter. He insisted that his dispute both before the trial court and this court is a criminal matter arising from criminal trespass. He said, the orders by the trial court magistrate were given without allowing the applicant to be heard and therefore appealing was the only appropriate remedy to rectify the committed error.

I have considered the rival submissions. I have read the impugned trial court order dated 22/9/2022 given in the presence of the appellant in court. In that order, the appellant's application was struck out for being

improperly filed before the Resident magistrate court. The order was drafted as follows:

*“Court: I don’t understand the documents filed by the applicant. The documents are defective, and they are seeking this court to give orders which can’t give. It would appear there is a land dispute which faces the applicant, and this is not the right venue. I would like to direct the applicant to go for a civil case or he shall go to the police to open a criminal case in connection with the land or property to wit a house trespassed into. Otherwise, I struck out this application.”*

It is clear from the replicated part of the ruling of the trial court that the application subject to this appeal was struck out for being incompetent. Mainly, the first objection challenges the jurisdiction of this court to entertain this appeal emanating from an order striking out an application. It is suggested by the State Attorney that the remedy available for the appellant was to refile a fresh application before a proper court but not to come to this court through an appeal.

Indeed, the settled law in our jurisdiction is that once a matter is struck out the appropriate remedy is to refile the same either before the same court that gave the order or another competent forum but not to appeal. This position was well echoed by the Court of Appeal in **Joseph Mahona @ Joseph Mboje @ Maghembe Mboje and Another v. The Republic**, Criminal Appeal No. 215 of 2008 (unreported) where it held:

*“In the instant case, the matter before the High Court was not dismissed but struck out That implies according to Ngoni Matengo Co-operative Marketing Union Ltd v. Ali*

*Mohamed Osman [1959] 1, E.A. 577 the matter was incompetent which means there was no proper application capable of being disposed of. The established practice is that the applicant in an application that has been struck out is at liberty to file another competent application before the same court before opting to appeal as has appeared in this appear. [Emphasis Added]*

Again, the Court of Appeal citing with approval the case of **Joseph Mahona @ Joseph Mbije @ Maghembe Mboje and Another v. The Republic( Supra)** while deliberation on the remedy available to a matter that is struck out for incompetence in **Mustapha Songambe V R**, Criminal Application No 3 of 2016, had this to say on page 6 and7 of the ruling:-

*“Since the applicant's application for extension of time was struck out by the Court for moving the Court under a wrong provision of the Rules, the applicant is at liberty to file the same application after correcting the shortcoming noted by the Court. We take note that to be the intention of the Court when it stated that the applicant could reinitiate the process. Simply stated, the applicant has to lodge a proper application for an extension of time to apply for review before the Court.”(Emphasis added)*

A similar position was taken by the Court of Appeal in **Tanzania Standard (Newspaper) Limited. V The Honourable Minister for Labour Employment and Youth And 2 Others**, Civil Appeal No. 46 of

2016 (Unreported). Like in the present matter, the appellant in that case, Tanzania Standard (Newspapers) Limited had approached the Court (High Court) for leave to apply for Prerogative orders of certiorari and mandamus. Her application however could not go to merit. It was in the end struck out for being incompetent. Aggrieved, the appellant filed an appeal to the Court of Appeal challenging the High Court order that struck out the matter. Before going to the merit of the appeal, the Court of Appeal suo-moto raised an issue on whether the appeal was proper before it. Having heard the parties on the point the court on page 17 observed.

*"Indeed, it is clear that this appeal emanates from the order striking out the application which in our firm opinion did not shut out the door to the appellant to return to the same court to seek the requisite leave to apply for prerogative orders of certiorari and mandamus."* (emphasis added)

See also **UAP Insurance (T) Limited V Yuda Shayo & 6 Others**, H/C Labour Revision Application No. 433 Of 2021, **Emmanuel Luoga v. Republic**, Criminal Appeal No. 281 of 2013, and **Yahya Khamis v. Hamida and 2 Others**, Civil Appeal No. 225 of 2018 (all unreported),

Since the appellant's application was struck out by the trial court for being incompetent, the Applicant had a right to go back to the same court or another forum as directed in the trial court order to initiate his complaints process afresh before resorting to the appealing process. This ground alone suffices to dispose of the appeal.

For the foregoing, the 1<sup>st</sup> preliminary objection is sustained, resulting in striking out the appeal for being prematurely filed before the court.

Order accordingly.

**Dated at Dar es Salaam, this 28<sup>th</sup> April 2023**



**E. Y Mkwizu**  
**Judge**  
**28/4/2023**