

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISC. CRIMINAL APPLICATION NO. 3 OF 2022

(Arising from Criminal Revision No. 7 of 2022 from the District Court of Hanang' at Katesh)

DEEMAY LOHAY.....APPLICANT

VERSUS

JULIANA MUHALE.....RESPONDENT

RULING

Date: 24/5/2023 & 1/6/2023

BARTHY, J.

This is a ruling on preliminary objection raised by the respondent to the effect that;

- 1. That the applicant application is out of time without good cause.*
- 2. That, the applicant application is against non-decision, because case No. 227 of 2022 is still pending before primary court.*



Following the preliminary objections raised, the matter was ordered to be disposed of by written submissions. However, the respondent did not file her submissions as ordered by this court, thus the respondent had none to reply. Instead of dismissing them for want of prosecution I invited the parties to address the court on the above preliminary objections.

This was made in consideration of the decision made in the case **of Deonisia Onesmo Muyoga and 4 others v. Emmanuel Jumanne Lihabula**, Civil Appeal No. 219 of 2020 where the Court of Appeal held that; it is the settled law that, once a preliminary objection is raised, it must be determined first before the substantive case is heard and determined.

The respondent did not enter appearance thus, the applicant who was represented by Mr. Raymond Kim was invited to address the court on the above preliminary objections raised.

Submitting on the first preliminary objection, Mr. Kim was firm that it lacks merits as the instant matter is for extension of time to file an appeal out of time. Thus, the case cannot be said to be out of time.



On the second preliminary objection Mr. Kim contended that the same is not on the point of law, since the applicant intends to challenge the jurisdiction of the trial court. He further argued that, the applicant had filed a preliminary objection on jurisdiction of the court which was overruled by the trial court, hence the applicant lodged an application for revision to fault the decision of the trial which was also turned down, hence the instant application.

He also admitted that the case before the trial court was not determined on merit. However, he was firm that the issue of jurisdiction is of paramount for determination of the case.

Having heard the arguments of the learned advocate the issue for my determination is whether the preliminary objections have merits.

In order to appreciate the nature of the matter, the brief facts giving rise to the instant application are necessary. The above-named applicant was arraigned before Katesh Primary court (hereinafter referred to as the trial court) for one count of stealing contrary to Sections 258 and 265 of the Penal Code [CAP 16 R.E 2022].



It was alleged that the applicant did steal seven sacks and two tins of sunflower seeds valued at Tsh. 580,000/- the property of the respondent herein. It is on record that, before hearing of the matter had commenced, the applicant raised an objection as to the ownership of the said land. The applicant claimed the said piece of land belonged to him. Upon hearing of the objections raised the trial court overruled the same.

The applicant aggrieved with the said decision, he lodged Criminal Revision No. 7 of 2022 before Hanang' District court (the district court). Prior the determination of the matter, the respondent raised the preliminary objections on the competency of the revision before the district court.

After hearing of the matter, the district court dismissed the application for the reason that the decision of the trial court was an interlocutory order and the same is not appealable/review. Hence it ordered the record be remitted to the trial court for determination of the matter.

The applicant with intention to challenge the said decision through an appeal, but he was unable to do so timely he preferred the instant application for extension of time.



In determining the preliminary objections raised, the first preliminary objection is misconceived and the same is accordingly overruled. The reason being that, the instant application is for extension of time, hence it cannot be time barred.

On the second preliminary objection, the same being drawn by a lay hand it speaks for itself. Essentially the second preliminary objection invites this court to determine on whether the applicant could prefer an application for revision and subsequently the instant application where the applicant wants to initiate appeal against the interlocutory order of the trial court.

Mr. Kim pointed out that, the issue of jurisdiction of the court is paramount to the adjudication of the matter. He maintained that, the applicant was justified in filing an application for revision before the district court.

On this issue I have dispassionately considered the applicant's contention, it is however my settled opinion that the ruling of the trial court being the preliminary objection it did not finalize the matter. That being said, the Magistrates' Courts Act [CAP 11 RE 2019], (the MCA) is silent as to



whether preliminary or interlocutory decisions of the primary court can be challenged through appeal or revision.

Nonetheless, the provision of Section 43 (2) of the MCA bars appeals or application for revision against preliminary or interlocutory decisions or order of the district court or a court of a resident magistrate unless such order or decision has the effect of finally determining the criminal charge or the suit.

I am of the settled mind that the prohibition stated under Section 43 (2) of the MCA can be safely extended to cover preliminary or interlocutory decisions of the primary court. As rightly decided by the district court that the application for revision lodged before it against the ruling of the trial court was unmaintainable.

The same was also decided in the case of **Sudi Khamis Sudi & 3 others v. Maureen George Mbowe Jiliwa & 3 others** Civil Application No. 362/17 of 2018 Court of Appeal of Tanzania at Dar es Salaam (unreported) the court succinctly stated that no revision can be preferred against ruling on preliminary objection which did not finalize the matter.

Since the trial court had overruled the preliminary objection, the applicant could not challenge the same through appeal or revision. Rather the



applicant was required to wait final determination of the matter to have then lodge his appeal. As the issue of jurisdiction of the court can be raised at any stage including the appeal stage.

Consequently, I uphold the preliminary objection and the application is accordingly struck out the record is remitted to the trial court for determination of the matter.

It is so ordered.

Dated at Babati this 1st June 2023.



G. N. BARTHY,

JUDGE

Delivered in the presence of the applicant in person and Mr. Raymond Kim learned advocate for the applicant.