

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 140 OF 2022

(Originating from Misc. Civil Application No. 183 of 2021 of Kinondoni District Court
dated 16th August, 2022)

HAMAD SULEIMAN NANJOBE.....APPLICANT

VERSUS

MARK AUGUSTINE MMASY.....1ST RESPONDENT

MUYA S. BAKARI.....2ND RESPONDENT

JUDGMENT

Date of Last Order: 22/08/2023

Date of Judgment : 25/08/2023.

E.E. KAKOLAKI, J.

In this appeal the appellant is challenging the ruling of the District Court of Kinondoni at Kinondoni in Misc. Civil Application No. 183 of 2021, dated 16th August, 2022, in which the 1st respondent successfully applied for restoration of his application in Misc. Civil Application No. 87 of 2021 after the court had dismissed it on 16th August 2021 and allowed to be heard on merit. He had fronted two grounds of appeal going thus;

1. That the District Court entertained the application while the provision cited in the chamber application do not vest powers to the court to set aside dismissal order.
2. That the appellant was denied his right to be heard as the legal issue on jurisdiction of the court raised during hearing was ignored.

On the strength of the above grounds of appeal, appellant invited this court to nullify the ruling and decree of the District Court and order cost of the appeal to be paid for by the respondents and any other or further reliefs this Court may deem just and fit to grant.

Hearing of the appeal took the form of written submission in which appellant appeared self-represented but had his submission prepared and filed by Ally Kimweri, learned counsel, while the 1st respondent hired legal services of Mr. Juma Nassoro, learned advocate. In his side the 2nd respondent despite being served by way of publication of summons in Mwananchi newspapers dated 5th August failed to enter appearance, the result of which hearing proceeded ex-parte against him. Both parties adhered to the filing schedule, but the appellant waived his right to file rejoinder submission. In this judgment, for the reasons to be apparent soon, I am not intending to reproduce the

submission by the parties but I will accord it the deserving weight and make reference to where need be.

In the course of perusal of the submissions by the parties it came to the attention of this Court that, the 1st respondent raised a legal issue as to the competence of the appeal before the Court for challenging an interlocutory order, contrary to section 74 b (2) of the Civil Procedure Code, [Cap 33 R.E 2019] (the CPC), the issue which the appellant waived his right to be heard on when chose not to file a rejoinder submission.

Since it is the court's practice to dispose of first any point of objection raised before the Court before going into merit of the case, it is incumbent that the raised point on competence of the appeal be addressed and determined first for touching jurisdiction of this Court in entertaining the appeal before it.

In his reply submission Mr. Nassoro stated that, the appeal is incompetent for contravening the provisions of section 74(2) of the CPC for arising from interlocutory decision. It is true as stated by Mr. Nassoro that, as the law stand under section 74 (2) of the CPC, no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other tribunal, unless such decision or order has effect of finally determining the suit.

For the purposes of delightful deliberation of the point section 74 (2) of the CPC, states that:

(2) Notwithstanding the provisions of subsection (1), and subject to subsection (3), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other tribunal, unless such decision or order has effect of finally determining the suit.

My understanding of the above section is that, where the interlocutory order has no effect of finalizing the suit or any matter, the same cannot be appealed against. However that depends on the circumstances of each case.

The same position was stated by the Court of Appeal in the case of **Yusufu Hamisi Mushi and Another Vs. Abubakari Khalid Mart**, Civil Application No. 55 of 2020 (CAT-unreported) when deliberating on the provisions of section 5(2)(d) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019], where the Court had this to say;

*"It is clear from the reproduced provision that an appeal or application for revision is barred against any preliminary or interlocutory decision or order of the high court **unless such decision or order has finally determined the suit. Admittedly, the determination as to whether the decision or order is final, preliminary or interlocutory***

depends on the circumstances of each case.” (Emphasis supplied).

I am also persuaded with the decision in **Artincham Urban District Council** (1903) 1KB 547 the case that was quoted with approval in the case of **Yusufu Hamisi Mushi** (supra) at page 6, where in the former case Lord Alverstone defined an interlocutory order as follows:

“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”. (Emphasis added)

See also the case of **Murtaza Ally Mangungu Vs. The Returning Officer for Kilwa & Others**, Civil Application No. 80 of 2016 (Unreported). That being the position, the immediate issue for disposal is whether the appeal at hand meet the test explained above. In my humble view, it does not meet the test as the order or decision is taken to have finally determine right(s) of the parties when it is incapable of bringing back the matter to the same court on the same matter. Looking at the pleadings, the order issued by the trial Magistrate court, the has no effect of determining the rights of the

parties rather restoration of the suit so that their right(s) can be determined on merit. In view of the foregoing, I sustain the objection raised by the 1st respondent and hold that, the appeal is incompetent before the court. Consequently, I proceed to struck out the appeal for want of competence. The matter automatically reverts back to the District Court of Kinondoni for determination of the main suit on merit.

Cost to follow the event.

It is so ordered.

Dated at Dar es Salaam this 25th August, 2023.



E. E. KAKOLAKI

JUDGE

25/08/2023.

The Judgment has been delivered at Dar es Salaam today 25th day of August, 2023 in the presence of the appellant in person, and Mr. Oscar Msaki, Court clerk and in the absence of the 1st and 2nd respondents.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
25/08/2023.

