

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE SUB REGISTRY OF KIGOMA)**

AT KIGOMA

DC CIVIL APPEAL NO.04 OF 2023

(Arising from Kigoma District Court Civil Revision No.2 of 2022,
originating Ujiji Primary Court Civil Case No. 103 of 2021)

ANANIA LIGHTON.....APPELLANT

VERSUS

SELEMANI WILLIAM.....1ST RESPONDENT

MBEZI AUCTION MART AND CO. LTD.....2ND RESPONDENT

Date of last Order: 31/08/2023

Date of Judgement: 29/09/2023

RULING

MAGOIGA, J.

This ruling is in respect of preliminary objection on point of law that, this Appeal which emanated from the Civil Revision No. 2 of 2022 did not determine the rights of parties as such barred in law after being struck out, hence, not appealable.

Mr. Rwegoshora learned Advocate for the respondent submitting in support of the objection argued that the preliminary objection raised is to the effect that, Civil Revision No. 02 of 2022 did not determine the right of parties but was struck out and not dismissed. He further argued that the application was struck out because parties were not heard on merits of the application. He thus pointed out that, once a matter is struck out, a party has an option to refile. He, thus, went on to argue that, the remedy



available is to refile a fresh proper application. The learned advocate pointed out that, this preliminary objection is pegged under section 43 (2) of the Magistrate Court Act, [Cap 11 R.E 2019]. To buttress his stand, he cited the case of **Masolwa D. Masulu vs AG and another**, Civil Appeal No. 21 of 2017 CAT at page 11-12 where the court insisted that the proper remedy is to file a fresh application. He therefore insisted that there is no automatic right of appeal because the main case was not heard on merits. The effect of striking out an application or suit is to file a fresh application. On that note, Mr. Rwegoshora urged this court to find merits in this objection and proceed to dismiss the appeal with costs

In reply, Mr. Kagashe, learned advocate opposed the objection arguing that, it is a hopeless preliminary objection guided by the famous case of **Mukisa Biscuits** which has been referred several times and became a guideline on what a preliminary objection is.

He further argued that the cited section 43(2) of MCA has been misapplied because what was before District Court was not an interlocutory application but was a revisional application intended to revise trial court proceedings.

Mr. Kagashe further argued that the case cited is distinguishable because the case was not dealing with interpretation of section 43(2) of the MCA.



But this is a labour dispute which do not fit in the said application. He thus pointed out that right of appeal was explained by trial court.

To his opinion, the matter was finally heard and rights of parties were determined. He strongly submitted that the appeal is proper before this court and urged this court dismiss this preliminary objection with costs.

In rejoinder, Mr. Rwegoshora insisted that, section 43(2) of MCA is properly used because nowhere the court did determine the rights of the parties. So, he reiterated that the preliminary objection has merits and should be upheld. The case of Msolwa is relevant on principle, insisted Mr. Rwegoshora.

This marked the end of hearing of the preliminary objection. The task of this court is now to determine the merits or otherwise of the preliminary objection.

Having carefully heard and followed the rivalling submissions on this point by the parties for and against the preliminary objection raised, I have noted that; **One**, the Civil Revision No. 02 of 2022 at the District Court of Kigoma at Kigoma was on 9.9 2022 struck out for containing omnibus prayers.

Two, I have also noted that, observing that the said Civil Revision No. 02 of 2022 contained omnibus prayers, the court ceased to hear of the main application instead decided to struck it out. It can be reflected on page 5

of the ruling where the Resident Magistrate wrote and I quote; **I will therefore not proceed to determine this application on merits and I accordingly, struck it out with costs.**

However, what is in serious dispute between the learned advocates for the appellant and the respondent is whether section 43(2) of MCA is properly used.

For better and easy disposing of this point, let me start with the import of section 43(2) of the Magistrate Court's Act [Cap 11 R.E 2019]. For easy of reference, it provides as follows:

Section 43(2) Subject to the provisions of subsection (3), no appeals or application for revision shall lie against or be made in respect of any preliminary or interlocutory decisions or order of the district court or a court of a resident magistrate unless such decision or order has the effect of finally determining the criminal charge or the suit.

Going by the literal wording of the above provisions, is clear that it is an imperatively and mandatorily requirement that no appeal shall lie against a preliminary decision. As rightly submitted by the counsel for the respondent, the district court did not hear the matter, hence, the order which it gave that is struck out the application, no doubt and definitely, did not determine the rights of parties. 

The arguments by Mr. Kagashe in the light of what transpired in this appeal are but misconceived, misplaced and misleading, as such rejected on their face value.

I'm aware of the principle that the matter which is struck out, its remedy is not to appeal but to refile afresh.

That said and done, I have no hesitation, to hold that, the preliminary objection raised by Mr. Rwegoshora is meritorious. The appeal, thus, is hereby dismissed with costs for being barred and as such incompetent.

It is so ordered.

Dated at Kigoma this 29th day of September, 2023.



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S. M. MAGOIGA
JUDGE
29/09/2023