

**IN THE HIGH COURT OF TANZANIA**  
**(MOROGORO SUB-REGISTRY)**  
**AT MOROGORO**

**MISC. CIVIL APPLICATION NO. 4 OF 2019**

*(Arose from Civil Case No. 4 of 2019; in the Resident Magistrates' Court of  
Morogoro, at Morogoro)*

**RAMADHANI MYOLELE.....APPLICANT**

**VERSUS**

**HAMAD ALI ISLAM.....RESPONDENT**

**RULING**

15<sup>th</sup> Dec, 2023

M.J. CHABA, J.

Before me is an application for enlargement of time within which to file an appeal in this Court out of time against the ruling of the Resident Magistrate's Court of Morogoro, at Morogoro in Misc. Civil Application No. 7 of 2022. It is made under section 14 (1) of the Law of Limitation Act, [CAP. 89 R. E, 2019] and it is supported by an affidavit sworn by Ramdhani Myolele, the appellant herein. The respondent, Hamad Ali Islam filed counter affidavit objecting the application deposed by himself.

For better appreciation of this application, I find it appropriate to state the facts giving rise to this application onset. As gleaned from the applicant's affidavit, in 2019 the respondent herein filed Civil Case No. 4 of 2019 in the Resident Magistrate's Court of Morogoro against the applicant claiming for the payment of TZS. 226,000,000/= (Say Tanzanian Shillings Two Hundred



Twenty-Six Million). In reply, the applicant filled a written statement of defence (the WSD) admitting part of the respondent's claims to the tune of TZS. 63,000,000/= (Tanzanian Shillings Sixty-Three Million Only). The WSD was coupled with the Notice of Preliminary Objection (PO) to the effect that, the Court had no jurisdiction to try the matter. Afterwards, both parties signed a settlement agreement valued at TZS. 231,000,000/= (Tanzanian Shillings Two Hundred Thirty-One Million Only), that arose from Civil Case No. 4 of 2019 but the figures were neither pleaded in the plaint nor in written statement of defence. Even the raised PO on point of law was not determined by the Court. Later on, applicant filed Civil Application No. 7 of 2022 before the Resident Magistrate's Court of Morogoro seeking for an extension of time, to enable him to file an Application for Review, and his main ground being illegality. However, such an application did not survive because it was dismissed on 24<sup>th</sup> June, 2022. Further, the applicant filed Revision Application via Misc. Civil Application No. 40 of 2022 before this Court (Ngwembe, J., As he then was) but again, the application was dismissed on account that the proper remedy was to file an appeal.

Conversely, the instant application was faced by the counter affidavit lodged by the respondent who generally opposed it, and averred that the facts set forth in the affidavit do not constitute any sufficient grounds for granting the order sought by the applicant.



At the hearing of the application on 14<sup>th</sup> March, 2023, by consensus, parties agreed to argue and dispose of the application by way of written submissions. Thereafter, the matter was adjourned for necessary orders on 4<sup>th</sup> April, 2023 and later, on the 3<sup>rd</sup> May, 2023 to see if both parties were fully complied with the Court's scheduled order, and so found. Same day on the 3<sup>rd</sup> May, 2023 the advocates for both parties appeared before me with the view of setting the date for a ruling. However, Mr. Benjamin Jonas, Learned Advocate for the respondent, prayed to address the Court on a point of law which touches the jurisdiction of the instant application. Basically, I had no reason to refuse, and so granted as prayed.

Addressing the Court, Mr. Benjamin submitted that, essentially, the applicant is seeking for enlargement of time within which to file an appeal against an order issued by the Resident Magistrate's Court of Morogoro which refused to grant an order for extension of time. It was Mr. Benjamin's contention that, according to the decision of this Court in the case of **Mwananchi Agip Service Station Vs. Tanzania Revenue Authority**, Civil Appeal No. 26 of 2017, Dar Es Salaam registry (unreported), the Court held that, orders granting or refusing to grant extension of time are not amongst the orders appealable.

He concluded that, in this application, the orders sought cannot be granted by the Court on the ground of jurisdictional issue. Having heard the oral submission made by Mr. Benjamin, to his part, the Learned Counsel for the



applicant Mr. Baraka Lweeka prayed for a short adjournment so that could get time to prepare for himself ready for rebuttal. I granted his prayer and adjourned the matter till on 4<sup>th</sup> May, 2023. So, when the application was called on for hearing on 4<sup>th</sup> May, 2023, the Learned Counsels for both parties entered appearance and were ready to proceed with the hearing of the application on a point of law raised by Mr. Benjamin.

Responding to what Mr. Benjamin submitted in support of his argument, Mr. Lweeka argues that, this Court has vested with jurisdiction to hear the application and outright prayed the Court to dismiss the PO. He accentuated that, there are express provisions of the law which prevents the Court to proceed with the determination of the matter on merits, but the case cited by Mr. Benjamin, the case of **Mwananchi Agip Service Station** (supra) is all about appeals from orders, while the matter at hand do not emanate from an order as the respondent intendeds to appeal from the final decision of the Resident Magistrate's Court of Morogoro and not from an order as stated by the Counsel for the respondent. He argues that, an order of the Court is not final, but it is such a decision that intends to control, what he stated to be the decision of the Court. He said, in nature orders are summary of a decision, such as; an order for dismissal of the suit appealed against or an application for want of prosecution. But when the Court hears both parties on merits, at the end of the day, must come up with the judgement or ruling and not an order. The Counsel referred this Court to the case of **Ramadhani Myolele Vs. Hamadi Ali Islam**,



Misc. Civil Application No. 40 of 2022, HCT at Mororogo (unreported) (Ngwembe, J., As he then was), and submitted that, the same brought so called conflicting decision upon observing among other things that, when an application for extension of time is refused by the Court, the remedy is to appeal or file a revision matter.

He asserted that, in the circumstances, where there are two conflicting decisions, the most recent decision must prevail. He was of the opinion that, since the decision cited by Mr. Benjamin, **Mwananchi Agip Service Station** (supra) was delivered on 6<sup>th</sup> July, 2018 and the one he has submitted in this Court, the case of **Ramadhani Myolele Vs. Hamadi Ali Islam** (supra), it means that, the case **Ramadhani Myolele Vs. Hamadi Ali Islam** is the most recent case it must prevail. He invited this Court to make reference to the decision underscored by the Court of Appeal of Tanzania in the of **Arcopar (O.M) S.A Vs. Harbert Marwa and Family investment Co. Ltd and Three Others**, Civil Application No. 94 of 2013 to reinforce and support his argument.

From the foregoing, Mr. Lweeka stated that, even though the two conflicting decisions are not binding in nature, but he humbly prayed the Court be persuaded by the most recent decision of **Ramadhani Myolele** (supra).

He went on contending that, it has been the practice of the CAT that when an application for extension of time is refused by the Lower Courts, the CAT has been receiving the appeal and determine it. In his view, he believed that, an order refusing an extension of time sought by the applicant is



appealable. To bolster his argument, he cited the case of **Patrick John Butabile Vs. Bakresa Food Products Ltd (Civil Appeal 61 of 2019) [2022] TZCA 224 (28 April 2022)**, particularly on pages 2 & 10 and the case of **Joseph Sweet Vs. The Republic**, Criminal Appeal No. 11 of 2017 (unreported) on pages 3, 5 and 6. He submitted that, in these two cases, this Court refused to grant the sought order for extension of time, but on appeal, the CAT granted.

He argues that, since the matter at hand involves an application for extension of time to file an appeal against the decision of the Resident Magistrate's Court of Morogoro in Misc. Civil Application No. 7 of 2022 which refused to grant the order for extension of time, hence, on the basis of his submission and the authorities he cited to fortify his argument, he believed that the decision of the Resident Magistrate's Court is appealable, and this Court is clothed with the respective jurisdiction to entertain the application, and the PO hold no water. He thus, prayed the Court to dismiss the PO with costs.

To rejoin, Mr. Benjamin commenced his submission by highlight that, the cases of **John Sweet Vs. Republic** and **Patrick John Butabile** (supra), not only that are irrelevant but also are inapplicable in the circumstance of this application. Giving the reasons, Mr. Benjamini stated that, the powers of the CAT to receive and register the appeal are purely regulated by different laws and procedures and not the Civil Procedure Code [CAP. 33 R. E. 2019] (the CPC). He added that these two matters are regulated by different schemes of



the laws which is contrary to what which are regulated by CPC and CPA. On that account, the Court may find that, the two decisions are not applicable in the present matter.

Regarding the recent decisions of the cases supplied before this Court as relevant authorities, Mr. Benjamini averred that, the principle expounded by the Court touches the CAT conflicting decisions. He invited this Court to refer at page 18 of the cited case of **ARCOPAR (O.M.) S.A** (supra). He argues that, since the principle was laid down to suit the CAT, then such a decision cannot be applied by this Court.

He underlined further that, the applicant also did not explain how the two decisions are conflicting (Ngwembe, J., As he then was). He argues that, in the case of **Mwananchi Agip Service Station** (supra), this Court held that, there is no inherent right of appeal because, appeal is the creature of the statute and therefore, it is not provided by the law (See: pages 5 and 6). He said, this principle was not even discussed in the case of **Ramadhani Myolele** (supra). He highlighted that, it is worth noting that, the decision in the case of **Ramadhani Myolele** the Court did not discuss the principle which was discussed in the case of **Mwananchi Agip**. He stressed that, this decision is the one which triggered the present application (Misc. Application No. 40 of 2022)

As to the case of **Mwananchi Agip Service Station**, he submitted that on page 6 last paragraph at the bottom, the Court was clear that, an order for



extension of time is not one of the appealable orders. The Court based its decision under the provision of section 74 and Order XL both of the CPC. He clarified that, the law is clear that, if there is law to cite, one cannot appeal such order or decision if there is no any other express provision conferring jurisdiction.

In view of the above, his contention is that, by virtue of section 74 and Order XL both of the CPC, the applicant's understanding of an Order is misconceived and highly misguided. He said, section 3 of the CPC describes an Order to mean the formal expression of any decision of a Civil Court which is not a decree. Thus, by virtue of section 74 and Order XL both of the CPC, a decision to grant or refuse an application for extension of time is an Order. He emphasized that, since the Counsel for the applicant did not explain where the definition of the word Order was extracted, it means he failed to build up his argument. He concluded by urging the Court to dismiss the application with costs.

I have dispassionately considered and weighed the rival arguments from both parties. Before embarking on the merits or otherwise of this application, it is wise to determine first the issue of law raised by the Counsel for the respondent, that this application is improper before this Court as the order refused the application for extension of time is not appealable. I have scrutinized the judgement of the Resident Magistrate's Court of Morogoro, at Morogoro and further considered the rival submissions made by the Counsels



for both sides. The pertinent issue for consideration, determination and decision thereon is whether the application is competent before this Court.

At the outset, I agree with the Learned Counsel for the respondent, Mr. Benjamin that, not every order can be appealed against. Appeals against orders emanating from the District Court or Resident Magistrate's Court are governed by section 74 and Order XL, Rule 1 of the CPC. In addition, section 74 and Order XL of the CPC are not exhaustive on the orders or decisions that are appealable to this Court. For instance, section 74 (2) of the CPC takes cognizance of appeals against decisions or orders which have the effect of finally determining the suit. It read:

*"Section 74 (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 the effect of finally determining the suit".*

In light of the above provision of the law, the issue for consideration is whether the decision of the Resident Magistrate's Court refusing extension of time is appealable. I have fully considered the application in line with the affidavit deposed by the applicant which lays the basis of this application. No doubt that, the applicant is seeking for enlargement of time within which to file



an appeal out of time. To determine whether the order in the ruling issued by the Resident Magistrate's Court is appealable, it is necessary to revisit the law in line with the order issued which is the subject of this point of law raised by the Counsel for the respondent.

On reviewing the relevant law, it is my considered view that, an application for extension of time to file review out of time, despite conclusively being heard and determined on merit by the Court, does not necessarily become appealable. In his submission, the Counsel for respondent is of the view that, the order dismissing extension of time to file review application out of time is not in the list of appealable orders listed under section 74 read together with Order XL, Rule 1 (a) - (v) of the CPC. I think in my view that, non-listing of the order dismissing the application for extension of time to apply for review out of time was not accidental. On this point, I subscribe to the findings made by my brethren on the Bench Hon. Kisanya, J., in the case of **Chacha Nyikongoro Vs. Ndege Kiseke**, Misc. Land Application No. 145 of 2020 HCT at Musoma (unreported), where he stated that; an appeal against an order not in the list of appealable orders under section 74 read together with Order XL, Rule 1 of the CPC becomes incompetent before the Court liable to be strike out. Right of appeal though guaranteed by the Constitution of the United Republic of Tanzania, but the same is subject to the respective law in force of which the matter at hand is governed by the CPC. See: **Zuberi Mussa Vs. Shinyanga**



**Town Council**, Civil Application No. 100 of 2004, CAT sitting at Mwanza (unreported) pp.9-10, where the Court held that: -

*"Likewise, we think that Munuo's case which was decided before article 107A (2) (e) featured in our constitution, as observed in Hamza Sungura's case (supra), **did not do away with all the rules of procedure in the administration of justice in the country.** Article 107A (2) (e) of the Constitution does not contemplate that either. Learned counsel for the applicant, Mr. Mtaki at the prompting of the Court, admitted that much and we think correctly so". [Bold is mine].*

From the above discussion, since the order appealed against is not amongst the appealable orders listed under the provision of section 74 read together with Order XL, Rule 1 (a) - (v) both of the Civil Procedure Code, [CAP. 33 R. E. 2019], I uphold the point of Preliminary Objection raised by the Learned Counsel for the respondent that, this Court is not clothed with the jurisdiction to entertain this application and so declare that, this application for extension of time is incompetent before the Court.

In the event, I hereby struck out the application with no order as to costs. It is so ordered.

**DATED at MOROGORO** this 15<sup>th</sup> day of December, 2023.





M. J. CHABA

JUDGE

15/12/2023

Court:

Ruling delivered this 15<sup>th</sup> day of December, 2023 in the presence of Ms. Suzana Mafwele, learned counsel for the Applicant and in the absence of Respondent.



A.W. Mmbando

DEPUTY REGISTRAR

15/12/2023

Court:

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.



A.W. Mmbando

DEPUTY REGISTRAR

15/12/2023