

**IN THE HIGH COURT OF TANZANIA**

**(MAIN REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 30 OF 2023**

(Arising from Misc. Civil Application No. 18 of 2023 before Hon. Kakolaki, J.)

**FREDRICK ANTHONY MBOMA ..... APPLICANT**

**VERSUS**

**SERIKALI YA MTAA KIBANGU.....1ST RESPONDENT**

**UBUNGO MUNICIPAL COUNCIL.....2NDRESPONDENT**

**ATTORNEY GENERAL.....3RD RESPONDENT**

**RULING**

*Date of Last Order: 05/12/2023.*

*Date of Ruling: 15/12/2023.*

**E.E. KAKOLAKI, J.**

This ruling seeks to determine the preliminary objection raised by the respondents against the applicant's application to the effect that;

1. The application is misconceived and bad at law for contravening the provision of Section 78(2) of the Civil Procedure Code, Cap 33 R.E 2019.

Briefly before this Court the applicant preferred this application for review pursuant to Section 78 (1)(b), 3A, 3B and Section 95, Order XLII Rules 1(1)

(a) and 3 Order XXXIX RULES 1 (1) and 1(2) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) and Section 19(2) of the Law of Limitation Act, [Cap. 89 R.E. 2019] (the LLA), praying for this Court to vacate the ruling and its order issued on 11/08/2023 after sustaining the preliminary objection raised by the respondents in Misc. Civil Application no. 18 of 2023, thus allow the struck out application to be heard on its merits.

Bearing in mind the practice of Court that, when a preliminary objection is raised the same has to be disposed of first as it was held in the case of **Bank of Tanzania Ltd v. Devran P. Valambia**, Civil Application No. 15 of 2002 (CAT - unreported), parties were heard orally on the raised preliminary objection.

The applicant appeared unrepresented, while the respondents enjoyed the services of Madam Jesca Joseph Shengena, learned Principal State Attorney. Submitting in support of the preliminary objection raised by the respondents, Ms. Shengena argued that, the application is incompetent for contravening the provisions of section 78(2) of the CPC as the ruling or order sought to be reviewed did not determine the matter to its finality since that decision is based on preliminary objection raised by the respondents to the effect that, it was incompetent for being supported by incurably defective affidavit

containing legal arguments, opinions, conclusions, issues which was in contravention of the provisions of Order IX of the CPC. According to her, since the application was struck out on that ground it was not determined on merit or to its finality, meaning that the doors are not closed for the applicant to bring a fresh application. She referred this Court to its own decision in the case of **Masoko Agencies (T) Limited Vs. Precision Air Services Plc**, Commercial review No. 06 of 2019 (HC-unreported) with the submission that it carries similar circumstances to the present matter, where the application was struck out with costs for contravening the provision of section 78(2) of the CPC, thus implored the Court to follow the stream and struck out this application with costs on similar reasons.

In response, the applicant opposed the respondent's preliminary objection arguing that the application is properly before the Court as even the case relied on by the respondents is distinguishable from the facts of this matter apart from not binding the Court. He said, in that case the ruling or order subject of review was made in the midst of the trial of the case, whereas in this application the order sought to be reviewed struck out the application in Misc. Civil application No. 18 of 2023 for being incompetent. As to whether the decision sought to be reviewed was determined to its finality or not, the

simple test argued is whether there was subsequent date set for continuation of the matter after delivery of the decision. If there is none then it can be concluded that that the matter was determined to its finality, the applicant insisted. In support of his stance relied on the case of **Ian John Kileo (the administrator of the estate of the late Pius Manywele Shangama Machilo Vs. Gratian Thadeo Mutashobya (as administrator of the estate of the late Fred Edward) and Three Others**, Misc. Civil Application No. 593 of 2022 (HC-unreported), where the applicant had filed application for review of the lower Court decision that had struck out his matter and the Court held that *"the order striking out the matter finally determined it"*.

He went on submitting that it is true that, he had an option of refiling the application or appealing against the 1<sup>st</sup> respondent's decision apart from preferring this review application. He however argued that, he chose to come by way of review first as other reliefs could come as second option in case review is not successful. It is from those submission he prayed for dismissal of the preliminary objection with costs.

In brief rejoinder, Ms. Shengena reiterated her earlier submission and added that, the cited case by the applicant is inapplicable in the circumstances of

this case as in that case the objection was based on application for revision under section 79(2) of the CPC whereas in this matter application for review is preferred under Section 78(1) of the CPC. In that regard she maintained her prayer striking out the application for want of competent with costs.

Having keenly considered both parties' fighting submission the only issue for determination is whether or not the application is incompetent before the Court as contended by the respondents. To respond to raised issue and given the contending submissions by the parties, it is imperative that the provisions of section 78(2) of the CPC alleged to be infringed be reproduced. Section 78(2) reads:

*"Notwithstanding the provisions of Subsection (1) no application for review shall lie against or be made in respect of any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit."*

The above cited provision in my humble view bars this Court to entertain an application for review emanating from preliminary or interlocutory decision, unless the decision has the effect of determining the suit to its finality. The sub-issue here is whether the decision of this Court Misc. Civil Application No. 18 of 2023 dated 11<sup>th</sup> August, 2023 striking out the application finally

determined the matter. It is settled law that, the matter/suit is deemed to be finally determine when tending to dispose of the party's rights. This legal stance was adumbrated in the case of **Zanzibar Electricity Corporation Vs. Infratech Ltd. And Another**, Civil Appeal No. 100 of 2021, (CAT-unreported), when referred to the case of **Rozson Vs. Altricham Urban District Council (1903) 1KB 547 at pg. 549**, where it was held that;

*"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".*

See also the case of **Peter Noel Kingamkono Vs. Tropical Pesticides Research Institute**, Civil application No. 02 of 2009.

Applying the above principle to the facts of this case, there is no dispute that in Misc. Civil Application No. 18 of 2023, the applicant was seeking for leave of this Court to appeal to the Court of Appeal against the decision of the Court in Misc. Civil Cause No. 39 of 2022, the matter which ended up being struck out for want of competence, basing on the grounds of objection raised by the respondents as rightly submitted by Ms. Shengena. Now as to what

exactly was the decision of the Court in Misc. Civil Application No. 18 of 2023, I find it sound to quote the last Court's order which reads:

*"In the event, I find the 1<sup>st</sup> point of objection meritorious and sustain the same. Since the same has effects of disposing of the application, I don't find any need to further determine the second point of objection. I therefore proceed to struck out the application for being supported by defective affidavit hence incompetent.,  
I order, each party to bear its own cost.,  
It is so ordered."*

According to the wordings of the above cited except for the court's decision, I have no hesitation in disapproving Ms. Shengena's proposition hence of the findings that, the decision by this court when striking applicant's application in Misc. Civil Application No. 18 of 2023 was final and conclusive. I so do for two sound reasons, **one**, the application was disposed of or determined basing on raised preliminary objections by the respondents. **Secondly**, when struck out the application was deregistered from the court register and therefore there was nothing pending for the Court to determine or try as it was the case in **Masoko Agencies (T) Limited** (supra). I agree with the applicant's submission that since there was no any subsequent date set for the continuation of the matter then for the purpose of Misc. Civil Application

No. 18 of 2023, the matter was determined to its finality. As to the case of **Ian John Kileo** (supra) I find the same to be inapplicable in the present matter as in that case there is nowhere it was held that, an order striking out the matter was finally determined as the applicant would want this court to believe.

It is true as submitted by Ms. Shengena that, applicant's prayer for leave to appeal to the Court to Appeal in Misc. Civil Application No. 18 of 2013 was not determine to its finality. But with due respect to her that does not necessarily mean that applicant's application was not determined as both parties were heard on the merit of the raised preliminary objections and the decision thereon made, thus disposing of the matter as the same was struck out for want of competence.

In the premises and for the fore stated reasons, I find that the preliminary objection raised by the respondents wanting in merit and proceed to dismiss the same with costs. I therefore order the application to proceed with hearing on merit.

It is so ordered.

Dated at Dar es Salaam this 15<sup>th</sup> December, 2023.





**E.E. KAKOLAKI**

**JUDGE**

15/12/2023

The Ruling has been delivered at Dodoma today on 15<sup>th</sup> day of December, 2023, remotely by video in the presence both parties.

Right of Appeal explained.



**E.E. KAKOLAKI**

**JUDGE**

15/12/2023

