

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBWA DISTRICT REGISTRY

AT BUKOBWA

CIVIL REVIEW NO. 02 OF 2022

*(Arising from Misc. Civil Application No. 30 of 2022 originating from Bukoba Resident
Magistrate's Court Civil Case No. 4 of 2019)*

GEOFREY OCHI.....APPLICANT

VERSUS

AMOS NDAMWESIGA MWIJAGE.....RESPONDENT

RULING

*25 /01/2023 & 27/01/2023
E. L. NGIGWANA, J.*

The instant application is a combination of two application (omnibus application) predicated under section 78 (1) and 93 of the Civil Procedure Code [Cap. 33 R.E 2019], supported by an affidavit sworn by the Applicant **Geofrey Ochi**.

In the first application, the Applicant is seeking this court to review its own decision in Misc. Application No. 30 of 2022 delivered on 1st day of September 2022 while in the second application, the Applicant is seeking for enlargement of time within which to file appeal out of time against the decision of the Resident Magistrates' Court of Bukoba at Bukoba in Civil Case No. 4 of 2019 delivered on 19/12/2019.

A brief background to this application is as follows; in Application No. 30 of 2022, the Applicant by the name of **Godfrey Ochi** was seeking extension of

time within which to file appeal out of time. On 01/09/2022, he was granted an extension of 14 days within which to file the said appeal.

Thereafter, the Applicant by the name of **Godfrey Ochi** filed Appeal No. 16 of 2022, however, the same ended up being struck out on 26/09/2022 for incompetence since it is common knowledge that failure to name the correct or misnaming or misspelling the name of the party may have prejudicial consequences especially when it comes to execution. In Civil Case No. 4 of 2019, the parties are Amos Ndamwesiga Mwijage (Plaintiff, now Respondent) against **Geofrey Ochi** and another (Defendants) but the person who filed Application No. 30 of 2022 was **Godfrey Ochi**.

Upon striking out the herein named appeal, the applicant by the name of **Geofrey Ochi** filed the instant application seeking for the orders earlier stated in the first page of this ruling.

The Applicant's affidavit supporting the application is to the effect that in Misc. Application No. 30 of 2022 the name of the Applicant was misspelled as Godfrey Ochi instead of Geofrey Ochi, likewise in the Memorandum of Appeal in Civil Appeal No. 16 of 2022, and since the applicant's name was misspelled starting with the application which granted leave to appeal out of time, then at the appeal stage, the said name of Godfrey Ochi could not be amended. It is further stated that the way of rectifying the said misspelled name of Godfrey Ochi is by way of reviewing application No. 30 of 2022 by ordering the name of **Godfrey Ochi** to read as **Geofrey Ochi**. It is further averred that extension of time to wit; 14 days granted in Application No. 30 of 2022 to the Applicant has expired since 15th day of September, 2022, hence prayer for enlargement of time.

The respondent in his counter affidavit did not object the application but he sought to be granted costs since the error was caused by the applicant's negligent.

When this application was called on for hearing, the applicant had the legal services of Mr. Alli Chamani, learned advocate while the respondent appeared in person, unrepresented.

Submitting in support of the application, Mr. Chamani adopted the applicant's affidavit to form part of his submission and re-iterated what has been stated therein. He added that as per section 78 (1) of the Civil Procedure Code [Cap. 33 R.E 2019], this court has powers to review its own order or decision. He also supported his argument by referring the court to the case of **Chandrakant Joshubhai Patel versus Republic** (2004) TLR 218 where the Court of Appeal held among other things that an error which will ground a review, whether it be one of fact or one of law, will be an error over which there should be no dispute and which results in a judgment which ought to be corrected as a matter of justice, and must be on the face of the record.

As regards, an application enlargement of time, the learned counsel submitted that as per section 93 of the CPC, this court has power to enlarge time after the expiry of the initial time granted by it. He added that, Appeal No. 16 of 2022 was struck out on 26/09/2022, and on 30/09/2022, the instant appeal was filed thus was promptly filed. Mr. Chamani ended up his submission urging the court to grant the application.

In reply, the respondent insisted that the applicant was negligent hence urged the court to order the applicant to pay costs of this application.

In his rejoinder, Mr. Chamani argued that the applicant was not at all negligent, and since it has not been explained by the respondent as to how the applicant was negligent; the allegations by the respondent that the applicant was negligent ought to be disregarded.

However, in the course of composing ruling of the court, I read carefully submissions for and against the application as well as the chamber summons and the counter affidavit and the applicable law, and found myself indebted to determine the competence of this application before determining its merit.

As stated earlier, this is an omnibus application. The first Application is an application for review while the second application is application for enlargement of time within which to file appeal out of time.

Since, the matter was pending for judgment, I was prompted to re-open the proceedings and invite the parties to address me on the competence of this application and they did so.

Mr. Chamani advocate for the applicant admitted that there was non-compliance of Order XLII rule 3 of the Civil Procedure Code [Cap.33 R.E 2019], thus the application is incompetent.

As regards the issue as to whether the combination of two prayers was proper, Mr. Chamani submitted that, the same has no problem because the extension of time was issued in the ruling which is sought to be reviewed. He added that, prior to the amendment of the CPC, application for review was supposed to be made by way of chamber summons supported by

affidavit. To support his argument, he referred this Court to the case of **Asharaf A. Kimaro versus Mariam Mohamed Kihyo**, Civil No.45 of 2003. He ended his submission urging the court to waive costs because the issue of incompetency has been raised by the court *suomotu*.

On his side, Mr. Mwijage (Respondent) conceded that this application is incompetent, and since he travelled all the way from Mbeya to Bukoba, and since Appeal No.16 of 2022 was also struck out on the ground of incompetency, and since Mr. Chamani is a very senior advocate who ought to have moved the court properly, this application be struck with costs. He also urged the court to concentrate on substantive justice as opposed to technicalities.

In his rejoinder, Mr. Chamani insisted that it is in the interest of justice that costs be waived since neither the advocate nor the client had been negligent. However, he did not dispute the fact that the respondent is currently residing in Mbeya Region.

Having heard submission by the parties, the issue for determination is whether this application is competent or otherwise.

The general rule in relation to applications as per Civil Procedure Code is that; every application has to be made by way of chamber summons supported by affidavit. However, every general rule has its own exceptions.

Order XLIII rule 2 of the Civil Procedure Code, Cap 33 R.E 2019,

"Every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit:

Provided that, the Court may where it considers fit to do so, entertain an application made orally or, where all the parties to a suit consent to the order applied for being made, by a memorandum in writing signed by all the parties or their having regard to all the circumstances under which the application is made."

One of the exceptions is provided for under Order XLII rule 3 of the Civil Procedure Code Cap.33 R.E 2019. The same states that

*"The provisions as to the form of preferring appeal **shall apply, mutatis mutandis, to applications for review**"*

It is undisputed that Order XLII rule 3 of the CPC as it appears herein above has been coached in the mandatory form, therefore; in my view, and being guided by section 53 (2) of the law of Interpretation Act which provides that, where in any written law the word "shall" is used in conferring a function, such a word shall be interpreted to mean that the function so conferred must be performed, compliance of the Order XLII rule 3 is not optional.

Reading Order XLII rule 3 of the CPC, it is apparent that application for review is made by way of **"Memorandum of review"** supported by **"grounds of review"**. The instant application was made by way of **"Chamber summons"** supported by **"an affidavit"** therefore, in any rate, what was filed by the Applicant through his advocate Mr. Alli Chamani in this Court does not amount to **"Application for review"**.

It is trite law that an affidavit is evidence on oath while the grounds for review require further proof to show the propriety of the said application, and for that matter, grounds of review cannot be raised in an affidavit.

As regards an application for enlargement of time, the same has to be brought by way of chamber summons supported by an affidavit. There is no way the same affidavit can serve as an affidavit supporting application for time enlargement on one hand and grounds of review supporting the memorandum of review on the other hand, thus the combination of the two applications that is to say; Application for review, and Application for enlargement of time in a single chamber application is fatal. See the case of **Nuru Ramadhani (Administrator of the estate of the late Zinabu Mussa) versus Nuru Abdalah Mbehoma**, Misc. Land Application No.86 of 2021 HC-Bukoba Registry (Unreported).

However, it should be noted that it is not automatically fatal to combine more than one prayer in one chamber summons. The Court of Appeal in the case of **MIC Tanzania Ltd versus Minister for Labour and Youth Development**, Civil Appeal No. 103 of 2004 had this to say;

*"The combination of the applications is not bad in law otherwise the parties would find themselves wasting more money and time on avoidable applications which would have been **conveniently combined**.... Unless there is a specific law barring the combination of more than one prayer in one chamber summons, the court should encourage this procedure rather than thwart it for fanciful reasons. See also **Project Manager Es-Ko International INC Kigoma versus Vicent Ndugumbi**, Civil Appeal No. 22 of 2009.*

The factors to be considered whether the prayers can be conveniently combined or not were discussed in the case of **Gervas Mwakafwala and 5 Others versus The Registered Trustees of Moravian Church in**

Southern Tanganyika, Land Case No. 12 of 2013 HC (unreported) where the court when faced with issue of omnibus application had this to say;

"I must hasten to say, however, that I am aware of the possibility of an application being defeated for being omnibus especially where it contains prayers which are not interlinked or interdependent. I think, where combined prayers are apparently incompatible or discordant, the omnibus application may be inevitably rendered irregular and incompetent".

Furthermore, in the case of **Ally Abbas Hamis versus Naima Hassan Ally Kanji**, Misc. Land Application No 140 of 2017HCLD (Unreported) the Court while guided by the decision of the Court of Appeal in **Mohamed Salmin versus Jumanne Omari Mapesa**, Civil Application No.103 of 2014 (Unreported) had this to say;

"Lumping of several prayers in a single application which those prayers are also different and the consideration to be taken into account are different, the conclusion is not hard to find, but to conclude that the application is omnibus and from the same reason, I have no option than to struck out with costs the omnibus application."

I am alive of the principle of Overriding Objective which was introduced to facilitate just, expeditious, proportionate and affordable resolution of disputes without due regard to technicalities as opposed to substantive justice, but the principle does not help a party to circumvent the mandatory rules and procedures. See **Martin Kumaliya and 117 others versus Iron and Steel Ltd**, Civil Application No.70/18 of 2018 CAT (Unreported). Furthermore, in the case of **Juma Busiya versus Zonal**

Manager, South Tanzania Postal Corporation, Civil Case No. 273 of 2020 CAT (Unreported) it was held that:

"The principle of overriding is not the ancient Greek goddess of universal remedy called panacea, such that its objective is to fix every kind of defects and omissions by parties in courts."

Reading carefully the herein cited Court of Appeal decisions, it is apparent that this application cannot be rescued by the principle of overriding objective because the said omission goes to the root of the application.

Drawing the inspirations from the High court decisions in **Gervas Mwakafwala and 5 Others versus The Registered Trustees of Morovian Church in Southern Tanganyika**, (Supra) and **Ally Abbas Hamis versus Naima Hassan Ally Kanji**, (Supra) in relation to applications/prayers which cannot be conveniently combined, and being guided by the Court of Appeal decisions in **MIC Tanzania Ltd versus Minister for Labour and Youth Development** (Supra), **Project Manager Es-Ko International INC Kigoma versus Vicent Ndugumbi**, (Supra) and **Mohamed Salmin versus Jumanne Omari Mapesa** (Supra), I conclude that this application is incompetent for the fore stated reasons. In that premise, I cannot go further to determine the merits of an incompetent Application. I have also considered the fact that the respondent is currently residing in Mbeya Region, therefore he had travelled all the way from Mbeya Region to Bukoba because of this application. In the premise, I proceed to strike out this application with costs for being incompetent. It is so ordered.

Dated at Bukoba this 27th day of January, 2023


E. L. NGIGWANA

JUDGE

27/01/2023



Ruling delivered this 27th day of January, 2023 in the presence of the Applicant and his Advocate Alli Chamani, respondent in person, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Sophia Fimbo, B/C.


E. L. NGIGWANA

JUDGE

27/01/2023

