

IN THE HIGH COURT OF TANZANIA

(At Dar es Salaam)

Civil Case No. 144 of 2010

DAR ES SALAAM CITY COUNCILPLAINTIFF

VS

HANIFA RAMADHANI.....RESPONDENT

RULING

Date of last Order: 04-10-2011

Date of Ruling: 08-11-2011

JUMA, J:

Earlier on 27th October 2010 the applicant Dar Es Salaam City Council applied for leave of this Court to enable the city council to appeal to the Court of Appeal of Tanzania in order to challenge the decision of this Court (Shangwa, J.) in **Civil Appeal No. 144 of 2007**. I dismissed that application on 23rd May 2011 for want of prosecution. Almost two months later on 19th July 2011 the applicant came back to this Court with another application by way of Chamber Summons under section 68-(e) and 95 of the **Civil Procedure Code, Cap. 33 (CPC)** asking me to set aside my Ruling of 23rd May 2011. In the affidavit which was taken out in support of the application moving me to vacate my Ruling, Mr. DEVIS

MISINGO explained that the applicant failed to enter an appearance to prosecute its application for leave because of breakdown of communication between the Court officers and the Dar es Salaam City Council.

Respondent Hanifa Ramadhani has opposed the application through a Counter Affidavit and Notice of Preliminary Objection. The Respondent has advanced the following grounds as a basis of their objection:

- i) The application is incompetent and untenable as it is brought under the wrong provision of the law.*
- ii) The application is time barred;*
- iii) The verification clauses of the affidavits do not state specifically the paragraphs of the affidavit for which the deponent believes to be true to the best of their knowledge;*
- iv) The jurat of attestation of the affidavits sworn by DEVIS MISINGO and SALUM KISIWA do not mention how the Commissioner for Oaths came to know the Deponents.*

The hearing of the points of objection proceeded by way of written submissions. With regard to the first point of objection, Kitare & Company Advocates submitted for the Respondent that section 68 (e) of the CPC, which empowers courts to make interlocutory orders to prevent the ends of justice from being defeated, and section 95 of the CPC providing for inherent

jurisdiction, cannot be employed to move this Court to give the orders the applicant are requesting. According to the Respondent, the applicant should have instead employed rule 13 (1) of Order IX of the **CPC**. The Respondent referred to several decisions of the Court of Appeal of Tanzania where the law is settled to the position that citation of wrong provisions of the law makes the whole application incompetent. The relevant Order IX Rule 13 of **CPC** states:-

***13.-(1)** In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.*

The Applicant through the City Solicitor's Office Dar es Salaam disputes the suggestion that sections 68 (e) and 95 of the **CPC** were not proper provisions to move this Court to set aside its Ruling of 23rd May 2011. According to the Applicant, since this Court dismissed his "application for leave to appeal to the Court of Appeal" but not a "suit," Order IX Rule 13 (1) of **CPC** which the Respondent has suggested as proper provision to move this Court

is not applicable inasmuch as it is about "a decree passed *ex parte*." The Applicant believes that since it was an "application for leave to appeal to the Court of Appeal" that was dismissed, it was not possible to cite Order IX Rule 13 (1) of **CPC** which deals with restoration of dismissal of *ex parte* decrees. Instead, the Applicant has instead resorted to sections 68 (e) and 95 of **CPC**.

Submitting on why Respondent thinks that the application to restore a dismissed application for leave is time barred, Kitare & Company Advocates cited Item 2 of Part III of the Schedule of the **Law of Limitation Act, 1971** which provides 30 days within which to set aside the *ex parte* decree. According to the Respondent, the Applicant filed his application outside the prescribed 30 days on 19th July 2011 which was 56 days after the date of Ruling. The Applicant does not agree with the submission contending that his application is time barred because his was an application but not a suit.

From the submissions made by the two opposing sides it is clear to me that my decision should inevitably establish whether the Applicant City Council of Dar es Salaam was correct way back on 27th January 2010 to employ the section 95 of the **Civil Procedure Code, Cap. 33** to move this Court into granting him leave to appeal to the Court of Appeal of Tanzania against the decisions of High Court of Tanzania. That is, whether section 95 of the Civil Procedure

Code is the correct provision for applicants seeking leave of the High Court before appealing to the Court of Appeal.

Records show that when the Applicant filed his application seeking leave to appeal to the Court of Appeal, the Applicant cited section 95 of the **Civil Procedure Code, Cap. 33**. Again on 19th July 2011 when the Applicant once again filed his application seeking the setting aside of dismissal order of this Court, the applicant employed section 68 (e) and 95 of the **Civil Procedure Code, Cap. 33**.

With due respect, it was not proper for the Applicant to peg its application for leave to appeal to the Court of Appeal of Tanzania by employing section 95 of the **Civil Procedure Code**. Section 95 literally means what it says; it is a fall back provision preserving the inherent powers of the Court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. In my understanding of section 95 of **CPC**, it cannot be used to sustain an application for leave to appeal to the Court of Appeal of Tanzania because there are clear provisions under the framework of the **Appellate Jurisdiction Act, 1979** and the **Court of Appeal Rules, 2009 GN 368 of 2009** governing such applications for leave. Provisions of the **Civil Procedure Code, Cap. 33** ceased to apply when this Court (Shangwa, J.) on 18th October

2010 delivered its Judgment and Decree (in **Civil Appeal No. 144 of 2007**).

Section 5-(1) (c) of the **Appellate Jurisdiction Act, 1979** is a proper provision which the Applicant ought to have employed on 27th October 2010 to move this Court to consider his application for leave to appeal to the Court of Appeal of Tanzania. This provision confers in the High Court concurrent jurisdiction with the Court of Appeal to grant leave to appeal to the Court of Appeal:

5.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal—

(a)...

(b)...

(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.

I must hasten to point out that the procedure for making applications for leave to appeal to the Court of Appeal through the avenue of the High Court is governed by Order XLIII Rule 2 of CPC because the **Appellate Jurisdiction Act, 1979** specifically provides for that.

From the foregoing, I can dispose of the entire points of objection without considering the remaining grounds of objection. In the first place, the Applicant should not have relied upon section 95 of the **Civil Procedure Code Cap 33** to move this Court both to grant him leave to appeal to the Court of Appeal and also to restore his application for leave following its dismissal.

From the foregoing, in an application like this one that seeks to restore an application for leave to appeal to the Court of Appeal, this Court must be satisfied that the application which the Applicant City Council of Dar es Salaam wants to be restored was in the first place properly before this Court before its dismissal for want of prosecution. I have already found that the Applicant wrongly employed section 95 of the **CPC** to move this Court when applying for leave to appeal to the Court of Appeal. This Court cannot restore an application for leave to appeal to the Court of Appeal of Tanzania which was in the first place incompetently before this Court.

Grounds of objection are hereby sustained. The Respondent is awarded her costs.




I.H. Juma
JUDGE
08-11-2011

Ruling is delivered in the presence of Hanifa Ramadhani (Respondent) and in the absence of the Applicant (Dar es Salaam City Council).




I.H. Juma
JUDGE
08-11-2011