

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

LAND APPEAL NO. 31 OF 2021

(Arising from Misc. Application No. 57B/2022 of the DHLT for Mwanza at Mwanza)

HASSAN JUMA MAMBO APPLICANT

VERSUS

MUSA IDD.....RESPONDENT

RULING

4th November & 28th November, 2022

Kahyoza, J.:

This Ruling is in respect of the preliminary objection raised by the Respondent that the appeal is incompetent before this court as the order in Misc. Application No. 57B/2022 dated 13/05/2022 is not appealable for being an interlocutory order.

The issue is whether the appeal is competent.

The matter was argued through written submissions and both parties complied with the scheduling order, although the respondent opted not to file a rejoinder. The respondent's submissions were drawn and filled by Akram Adam, learned advocate, while the appellant's submission on reply was drawn and filed by John Paul Kaunara, also learned advocate.

In his submission, respondent's counsel started by narrating what had transpired in the lower court that led to this appeal. That, the appeal emanates from the Ruling of the tribunal setting aside the dismissal order and restoring the appeal.

The respondent's counsel went on that, ruling in Misc. No. 57/2022 is an interlocutory order as it did not determine the rights of the parties in the pending appeal No. 57/2020. He cited the case of **Junaco (T) Ltd and Justin Lambert v Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 CAT Dar es Salaam as it was cited in the case of **Gabriel Francis v Ramadhani Issa**, Civil Appeal No. 53 of 2020, HCT Arusha, where the court used the nature of the order test to determine whether the order is an interlocutory or not.

It is his further submission that, the act of filling this appeal is contrary to the mandatory requirement of section 74(2) of the Civil Procedure Code [Cap. 33 R.E 2019] (the **CPC**), which does not allow appeals emanating from interlocutory decision or order unless the same has an effect to finally determine the suit. Respondent's counsel insisted that, the appellant has violated the mandatory procedure of the law as reflected in the case of **Gabriel Francis** (supra). He therefore prays for this appeal to be dismissed with costs.

Responding, the appellant's counsel was of the view that, interlocutory orders are issued by the court while the case is still on going before the final resolution of the case. That, interlocutory orders are passed to prevent irreparable harm from occurring to a person or property during the pendency of lawsuit or proceedings. That once an action has been commenced all subsequent applications are referred to as interlocutory applications.

The appellant's counsel went on that, the application for restoration does not is not an interlocutory application. Therefore, the decision of the tribunal of re-admitting the dismissed appeal does not fall under the ambits of being interlocutory order. He submitted that such a decision was appealable as it leaves no pending suit to be determined rather it is an independent application due to the reasons that, at that time there was no pending suit as the original one is already dismissed. He concluded that the High Court had the mandate to hear and determine this appeal like a normal appeal as it was in the case of **Nowa Shibanda vs Mwajuma Mwakonde**, Misc. Land Appeal No. 34 of 2019. He prayed the preliminary objection to be dismissed.

Appellants counsel went on to distinguish the case of **Gabriel Francis** (supra), as cited by the respondent as he argues that, the impugned ruling appealed against is not interlocutory order since there in

no appeal pending before the Tribunal as the same was dismissed and the file was closed.

The appellant's advocate concluded his submission by citing the case of **Mukisa Biscuit Manufacturing Co. Ltd. v West End Contributors Ltd.** [1969] EA 696, arguing that the preliminary objection must be a pure point of law to be seen directly on the eyes of the record needs no proof. He then prayed for the preliminary objection to be struck out with costs.

Having heard rival submission my task is simple that is answer the issue whether the appeal is competent. It is trite law that, an interlocutory order is not appealable as provided for under section 74 (2) of the **CPC**, which provides that no appeal shall lie in respect of the preliminary or interlocutory decision or order of the court unless such decision or order has an effect of finally determining the suit. The same provision has been emphasized in number of cases such as; **Seif Sharif Hamad v. S.M.Z.**, [1992] TLR43, **Tanzania Motor Services Ltd vs. Mehar, Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005, **Posts Corporation vs Jeremiah Mwandu**, Civil Appeal No. 474 of 2020.

The undisputable facts are that the tribunal dismissed the respondent's appeal for want of appearance. The respondent applied to set aside the dismissal order. The tribunal granted the application, set

aside its dismissal order and restored the appeal. The tribunal's order restoring the dismissed appeal displeased the appellant, he appealed to this Court. The respondent raised a preliminary objection that the appeal against an interlocutory order, hence, not competent. The appellant's argument is that the appeal was not against an interlocutory order as there was nothing pending as the appeal before the tribunal was dismissed.

I wish to put the record straight first by stating that the appellant's argument that there is no pending matter before the tribunal is a misdirection. We all agree that the tribunal by its order in Misc. No. 57/2022 set aside its dismissal order and restored the appeal. There is therefore an appeal pending before the tribunal.

Next, I will determine whether the order setting aside a dismissal order and restoring a dismissed appeal or matter is interlocutory order or not. The Court of Appeal defined term interlocutory order **Tanzania Posts Corporation vs Jeremiah Mwandu**, (supra), by quoting the decision in **Seif Sharif Hamad vs S.M.Z** [1992] TLR 43, where the Court adopted the definition in Black's Laws Dictionary (4th Edition), which defined the term interlocutory order as;

"An order which decides not the cause, but settles some intervening matter relating to it".

The Court of Appeal went further to borrow the definition of the term in the 9th Edition of the same dictionary which defined the term interlocutory order to mean;

"An order that relates to some intermediate matter in the case, any order than the final".

Further, in the case of **Junaco (T) Limited and Justin Lambert vs. Harei Mallac Tanzania Limited**, (supra) cited by the respondent's advocate, the Court of Appeal went further to discuss on how to determine whether the order is final or not, in which the Court used the *nature of order test*. The same very test was also discussed in the case of, **Posts Corporation vs Jeremiah Mwandu**, (supra), in which the Court posed two important question in determining nature of the order, **one**, what were the remedies that were sought or the rights that the party was seeking to enforce or obtain from the Court, and **two**, were all such rights or remedies conclusively determined by the court or there are certain matters in relation to the same rights that remained pending for determination at the court.

Asking the same questions in relation to the present case, the first question as to the rights sought by the parties determined? It is obvious the ruling restoring the dismissed appeal did not determine the parties right. Parties went to the tribunal for determination as to who is the

rightful owner of the disputed land. The ruling restoring the dismissed appeal did not declare anyone as the rightful owner of the suit land. Having answered the first question negative I need not answer the second question. Obviously, the order sought to be challenged by appeal did not determine the parties' right. It is for that reason interlocutory, hence, not appealable. I wish to conclude by referring to the decision of the Court of Appeal in **MIC Tanzania Ltd and 3 Others vs Golden Globe International Service Ltd Civil Application** No. 1/16 of 2017 CAT - DSM (unreported) where it was held that;

"...the proper test for determining whether or not an impugned order is preliminary or interlocutory is patently discernible from the language of the provision, itself. That is to say the test is whether or not the order desired to be revised [appealed against] had the effect of finally determining the suit.

The order of tribunal setting aside the dismissal order did not finally determine the appeal, it is therefore an interlocutory order.

In addition, an appeal is a creature of law. It is the law which provides parties with a right to appeal. The **CPC** is categorical as to which orders a party may appeal against. It is Order **XL** of the **CPC**, which lists down appealable orders. The law allows an appeal when an application for setting aside a dismissal order is rejected and not when it is granted. If the law wanted an appeal to lie against an order setting aside the

dismissal order, it should have so stipulated. Order **XL** of the **CPC** stipulates that-

*"1. **An appeal shall lie from the following orders** under the provisions of section 74, namely-*

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court;

(b) an order under rule 14 of Order VIII pronouncing judgment against a party;

*(c) an order under rule 9 of Order IX **rejecting an application** (in a case open to appeal) **for an order to set aside the dismissal of a suit;***

(d)...(V) N/A" (Emphasis is added)

An appeal against an interlocutory order or an order not specifically provided for under Order **XL** of the **CPC** is an abuse of the court process and thereby leading to unnecessary prolongations of proceedings.

A party aggrieved by an interlocutory order or any order not subject of appeal is permitted to challenge its correctness or otherwise at the time that aggrieved party is challenging the final and conclusive decision. See **Karibu Textiles Mills Limited vs. New Mbeya Textiles Mills Limited & Others**, Civil Application No. 27 of 2006 (unreported) as follows:

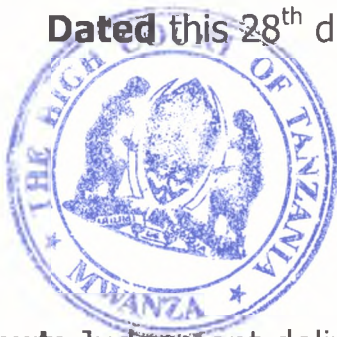
"We further agree with Dr. Lamwai's submission that the spirit of the amendment of the provision of the section 5(2)(d) of the Appellate Jurisdiction Act 1979 is to prevent unnecessary delays.

This is rightly so because interlocutory orders do not finally and conclusively determine the rights of the parties. Where a party is aggrieved by an interlocutory order, that can form a ground of appeal or revision if the party is dissatisfied with the final decision of the court....”

In the upshot, I find sustain the preliminary objection that the order setting aside the dismissal order and restoring an appeal dismissed for want of prosecution is not appealable. Consequently, I dismiss the appeal with costs and order the tribunal to proceed to determine the pending appeal with immediate dispatch.

It is so ordered.

Dated this 28th day of November, 2022.



J.R. Kahyoza
JUDGE

Court: Judgement delivered in delivered in the absence of the parties as either the parties or me, could not connect to the virtual court. Copies sent to the bench clerk for dispatch to parties

J.R. Kahyoza
JUDGE
28/11/2022