

**IN THE HIGH COURT OF TANZANIA**

**(MWANZA DISTRICT REGISTRY)**

**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 55 OF 2019**

*[Arising from the decision of the District Court of Ilemela in Revision No.1 of 2018,  
which originated from Probate cause No. 84 of 2016, Ilemela Primary Court]*

**BONIFACE INYASI ..... APPLICANT**

**VERSUS**

**AMINI HUSSEIN RUKOBA ..... 1<sup>ST</sup> RESPONDENT**

**IMMACULATHA A.KAZUYEYE, [Administratrix of  
the estate of late ROZA ANTHONY] ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

*19<sup>th</sup> November, 2019 & 5<sup>th</sup> March, 2020*

**M.M. SIYANI, J.**

On 10<sup>th</sup> April 2019, this court (Rumanyika, J) dismissed an appeal by Boniphace Inyasi (the applicant herein) for being time barred. Two weeks later that is on 24<sup>th</sup> April 2019, the applicant preferred this application for extension of time to file an appeal out of time. The application was preferred under section 25 (1) (b) of the Magistrate

Court Act Cap 11 RE 2002 and Rule 3 of the Civil Procedures (Appeals in Proceedings originated in Primary Court) Rules GN. No. 312 of 1964 and supported by the applicant's affidavit.

Having served with the application, the 1<sup>st</sup> respondent who enjoys the services of counsel Constantine Mutalemwa raised two points of preliminary objection in limine litis that:

- (1) *That this court has no jurisdiction to entertain the application as the same is res judicata on account that the same was finally determined by this court in PC Probate Appeal No. 11 of 2018 on 10<sup>th</sup> April 2019.*
- (2) *That the applicant is legally estopped from pursuing this application by his own deed as embodied in the deed of settlement as stated in paragraph 4 of the counter affidavit by the 1<sup>st</sup> respondent.*

When the application came for hearing of raised points of preliminary on 15<sup>th</sup> August 2019, counsel Mutalemwa prayed to abandon the 2<sup>nd</sup> point of his objection and proceeded to argue the remaining one. As the applicant had no legal representation, I directed that the point of

objection raised be argued by way of filing of written submissions. Submitting in support of the preliminary objection, it was argued that the question of time limitation as far as PC Probate Appeal No. 11 of 2018 is concerned was conclusively determined by this court 10<sup>th</sup> April 2019 and therefore the same issue cannot be re determined in the same court. Counsel Mutalemwa was of the view that following that decision, the applicant could have opted to appeal to the Court of Appeal of Tanzania against the dismissal order in PC Probate Appeal No. 11 of 2018 or apply for revision in the same court, but in any event not by way of applying for extension of time to appeal out of time.

The learned counsel believed that this court is barred by the doctrine of res judicata to re determine the question of time limit having already ruled the same to be time barred and referred the case of **EAST AFRICAN DEVELOPMENT BANK Vs BLUE LINE ENTERPRISES LIMITED**, Civil case Appeal No. 101 of 2009 which cited with approval the decision of the same court in **OLAM UGANDA LIMITED (suing through its ATTORNEY UNITED YOUTH SHIPPING COMPANY LIMITED) Vs TANZANIA HARBOURS AUTHORITY**, Civil Appeal No. 57 of 2002 to support his stance. As such counsel Mutalemwa argued



the instant application is misconceived and should be dismissed with costs.

The applicant sought the assistance of counsel Ditrick Raphael to prepare his reply submissions where through the same they argued that the instant application being for extension of time to present an appeal, is properly before the court in terms of section 25 (1) (b) of the Magistrate Court Act and Rule 3 of the Civil Procedures (Appeals in Proceedings originated in Primary Court) Rules GN. No. 312 of 1964 and that the question of time limitation was not determined by this court. According to the applicant the only thing that the court did on 10<sup>th</sup> April 2019 was to entertain a preliminary objection which was sustained and PC Probate Appeal No. 11 of 2018 was dismissed on the ground that the applicant (the appellant) did not seek leave to appeal out of time as required by the law.

The applicant was firm that arguing in support of the contention that the instant application is res judicata, would be to mislead the court and the case of **EAST AFRICAN DEVELOPMENT BANK Vs BLUE LINE ENTERPRISES LIMITED** cited by the 1<sup>st</sup> respondent's counsel was

therefore inapplicable under the circumstance. He contended that in terms of section 9 of the Civil Procedure Code Cap 33 RE 2002, a matter can only be barred by a doctrine of res judicata, if it is proved that the same involved parties who once litigated under the same issue before a court of competent jurisdiction and that issue was conclusively determined. Arguing from that line, the applicant submitted that PC Probate Appeal No. 11 of 2018 is different from the instant application in all aspects and therefore cannot be barred by the doctrine of res judicata.

In conclusion, it was submitted by the applicant that since section 25 (1) of the Magistrate Court Act Cap 11 RE 2002 and Rule 3 of the Civil Procedures (Appeals in Proceedings originated in Primary Court) Rules GN. No. 312 of 1964 allows one to move the court to extend time within which to file an appeal out of time, then the instant application is proper before the court and consequently the point of objection raised lacks merits and should be dismissed with costs.

Having revisited what was submitted by the court, it is apparently that this application for extension of time, arises from a dismissal order

issued by this court in PC Probate Appeal No. 11 of 2018 where the same was dismissed for being time barred. The question is whether or not an order dismissing a matter for being time barred amounted to its conclusive determination. This question need not detain me because similar issue was adequately dealt with by the Court of Appeal of Tanzania in **Olam Uganda Limited (suing through its attorney United Youth Shipping Limited) Vs Tanzania Harbours Authority**, Civil Appeal No. 95 of 2000 where the following was observed:

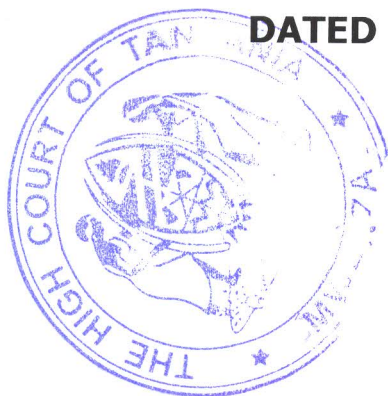
*A suit or legal proceeding instituted beyond that period does not lie and in the light of the mandatory provisions of section 3 (1) of the Law of Limitation Act... shall be dismissed whether or not limitation has been set up as a defense. In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision by this Court. (Emphasis supplied.)*



Taking a leaf from the above authority, it is apparently that since the appeal applicant's appeal was dismissed for being time barred, the remedy cannot be returning to the same court by way of an application for extension of time. In my considered opinion, the principle set in the case of **Olam Uganda Limited suing through its attorney United Youth Shipping Limited Vs Tanzania Harbours Authority**, cuts across all the proceedings regardless of the law applicable because when a matter is dismissed for being time barred, such dismissal order becomes final in that court as far as time limitation is concerned. The remedy (unless otherwise stipulated by the law) should always be to apply for review in the same forum or find an appropriate remedy in a higher court.

The above said, I find merits in the point of preliminary objection raised and the same is sustained. Accordingly the instant application is hereby dismissed with costs. It is so ordered.

**DATED at MWANZA** this 5<sup>th</sup> Day of March, 2020



**M.M. SIYANI**

**JUDGE**