

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

MISC. CIVIL APPLICATION NO. 12 OF 2020

(Originating from Civil Case No. 02 of 2017, High Court of the United Republic of Tanzania Moshi District Registry at Moshi, B. R. Mutungi .J.)

L. R. M INVESTMENT CO. LTD ----- APPLICANT

VERSUS

BANK OF AFRICA LIMITED ----- RESPONDENT

RULING

MUTUNGI .J.

The Applicant has under **Order VIII Rule 20 (2) of the Civil Procedure Code Cap 33 (Amendment of the first schedule) Rules, 2019**, filed this application for an order as hereunder;

“That, the Honourable Court be pleased to set aside its dismissal order made on 17/3/2020 and restore the case for final Pre-trial conference to be conducted”.

When the Respondent was served, did raise a preliminary objection to the effect that, the current application is hopelessly time barred and that there is wrong citation in the

enabling provision. It was then ordered by the court, that the preliminary objection so raised be argued by way of written submissions. Advocate Jaffary Suleiman representing the Respondent submitted that, the order subject of setting aside was made on 17th March, 2020 and the present application filed on 15th April, 2020 which is over twenty-eight days from the date of the said order. It was the Advocate's contention that such an application ought to have been instituted within fourteen days in terms of **Order VIII Rule 20 (2) G.N 381/2019**. In view thereof, there is no room for exclusion on computation of time on filing an application when the Applicant so wishes to institute the application.

The Respondent's counsel in his submission has pleaded with the court to desist from being carried away by sympathy. There is no evidence showing that the Applicant had made serious efforts to have his application filed on time. The bottom line is that, the Applicant was duty bound to file her application within fourteen days after the impugned order and a copy sent to the Respondent.

Be as it may, in case of restoration or setting aside, a copy of

the order or proceedings by the same court is not necessary. The Applicant shall not be required to attach the dismissal order issued by the same court. The remedy to such a scenario in the event the Applicant found herself late, is to file an application seeking for extension of time to file an application for restoration/setting aside.

It was the counsel's further submission that time limitation should be observed as stated in the case of **Edwards vs. Edwards [1968] I. W. L. R 149 at page 151**. Further that litigation would be endless and chaotic without the law of limitation which words of wisdom he quoted from the case of **Ami (Tanzania) Limited vs. OTTU on behalf of P.I, Assenga and 106 others, Civil Appeal No. 54 of 2008 (CAT-Dar es Salaam)**.

The learned advocate asserted, in the present application even the overriding objective principle would not amend the situation as the principle has not been introduced to disregard the rules of procedure that are coached in mandatory terms. To this the learned advocate cited the case of **Njake Enterprises Limited vs. Blue Rock Limited and another, Civil Appeal No. 69 of 2017 (CAT-Arusha)** unreported to support his stance.

The Respondent's counsel invited the court to look at the letter addressed to the Registrar on 17/3/2020 and lodged in his office on 18th March 2020 applying for copies of proceedings, ruling and order to find it was for the purpose of preparing and lodging an appeal to the Court of Appeal and not for filing the present application.

The learned advocate proceeded to submit on yet another point of law that, the Applicant's application for restoration of a suit has been brought under the wrong cited law. In his settled view the same ought to have been made under **Order IX Rule 3 of the Civil Procedure Code** which deals with suits. Now that the Applicant failed to cite the proper enabling law the same is rendered hopelessly incompetent and the counsel proceeded to cite the case of **Chama cha Waalimu Tanzania vs. The Attorney General, Civil Application No. 151 of 2008 (CAT-D'SM)** unreported to support his views.

In view of the foregoing written submission, the Respondent's counsel prayed the preliminary objection be sustained and the application be dismissed with costs.

On the other side of the coin, Mr. Kipoko learned counsel submitted that indeed **Order VII Rule 20 (2) Supra** caters for first Pre-trial conference settlement and scheduling

conference hence not applicable to the final pre-trial conference stage as is the case in this matter.

Be as it may, the time to restore a dismissed plaint at final pre-trial conference is not provided for hence resort should be made to item 21 part III of the Law of Limitation Act Cap 89. In view thereof the application was filed within time.

The foregoing notwithstanding, the Applicant's counsel proceeded to move the court to find, in the event the court finds that, the period for setting aside the Ex-parte dismissed order is fourteen days, then the same should be counted from the date when the court issued a certified copy. In this case, the Applicant immediately wrote a letter to the court requesting for the signed order as soon as they were informed of the same. In that regard the period within which the Applicant used to obtain the signed order should be excluded without need of the Applicant filing another separate application to seek for extension of time.

As far as the point on citing of the wrong provision of law is concerned, Mr. Kipoko learned advocate contended, it is now settled law in our jurisdiction that courts should dispense justice with due disregard to technicalities hence the omission so detected in this application is curable by insertion

of the correct provision. He further referred to the case of **Alliance one Tobacco Tanzania Limited and another vs. Mwajuma Hamisi (As Administratrix) of the estate of Philemon .R. Kileny and another, Misc. Civil Application No. 803 of 2018 (HCT-Dar es Salaam Registry) (unreported)** and outlined that, even if there is no provision cited but the court has jurisdiction to grant the prayer sought the court will in the circumstances determine the application despite the anomaly.

In view thereof the counsel concluded, this court under **Order IX Rule 3 of the Civil Procedure Code (Supra)** has the requisite jurisdiction to entertain this matter and proceeded to plead to the court to apply the overriding objective principle regardless of the alleged anomalies.

In rejoinder the Respondent's advocate retaliated his submission in chief.

On the outset, I will consider the second limb of the preliminary objection raised. It is apparent from the Applicant's chamber summons that the application is made in terms of **Order VII Rule 20 (2) of the Civil Procedure Code (Supra)** which falls under part "B" of the Civil Procedure Code (Amendment of the first schedule) Rule 2019 G.N 381/2019.

The same provides or caters for first Pre-trial settlement and scheduling of conference. The order sought to be set-aside was made and its effect was dismissing the suit for non-appearance of the Plaintiff (the Applicant) on the date scheduled for final Pre-trial conference and hearing. It does not need magic for one to find that, the preferred cited provision does not confer jurisdiction to the court to do that which the Applicant wants it to do. What seems to have been the intention of the Applicant was to set aside the dismissal order for want of prosecution. In other words, the court to restore the suit. This would mean the court should be moved by the proper enabling provision.

The Applicant's counsel did in his submission concede that indeed he had cited a wrong enabling provision and realized he ought to have cited **Order IX Rule 3 of the Civil Procedure Code** (already cited). It would seem the Applicant's counsel has tried in his submission to suggest that, this was a technical error or a mere technicality which can be cured by employing the overriding objective principle that has been recently introduced in our legal jurisprudence. In my settled opinion citing a wholly inapplicable provision of law is a serious omission not a legal technicality. The court does not

have the duty to correct or amend the party's pleadings or records. I am fortified in my views by the decision of the Supreme Court of this land in the case of **Njake Enterprises Limited vs. Blue Rock Limited and another (Supra)** that: -

"The overriding principle cannot be applied blindly on the mandatory provision of the procedural law which goes to the very foundation of the case."

The court is alive with the gravity such an error holds in that even the National Constitution of 1977 as amended from time does not support. I am guided by the scope and purview of Article 107A (2) (e) of the Constitution which advocates for substantive justice. The Apex Court in the case of **China Henan-International co-operative group vs. Salvand K.A. Rwegazira, Civil Application No. 22 of 2005 (unreported)** held;

"Citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107A (2) (e) of the Constitution. It is a matter which goes to the very roof of the matter.

We reject the contention that the error was technical.


The Applicant's counsel has cited the case of **Alliance one Tobacco and another vs. Mwajuma Hamisi (Supra)** convincing the court that as long as the court has jurisdiction to grant the prayer sought then the court should proceed to determine the application. With due respect to this very persuasive authority, I still hold that the court should be properly moved by citing the proper provision of law. It would be a wrong move to entertain an application which is not competent before the court.

In view of the foregoing analysis, it will be thus an academic exercise to proceed to determine the first limb of the preliminary objection, having ruled out that the application is incompetent before the court, I proceed to strike out the ~~same~~ forthwith with costs and the preliminary objection accordingly upheld.



B. R. MUTUNGI
JUDGE
22/10/2020

Ruling read this day of 22/10/2020 in presence of Mr. Kipoko for the Applicant and Mr. Tumaini Martin holding brief for Mr. Boniface Joseph for the Respondent.


B. R. MUTUNGI
JUDGE
22/10/2020

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
JUDGE
22/10/2020