

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 11 OF 2020**

(Originating from Land Case No. 69 of 2016)

**MAJOR TIMOTH MAGEGE ..... 1<sup>st</sup> APPLICANT**

**FAST LOGISTIC LIMITED ..... 2<sup>nd</sup> APPLICANT**

**VERSUS**

**MATHEW PARCEVAL CHAWANGA .....1<sup>st</sup> RESPONDENT**

**JUMA KWANGAYA ..... 2<sup>nd</sup> RESPONDENT**

**KCB BANK TANZANIA LIMITED ..... 3<sup>rd</sup> RESPONDENT**

**ABEL KISUVI SANGA T/A Unyangala**

**Auction Mart & Brokers ..... 4<sup>th</sup> RESPONDENT**

**CRISPIN PROSPER MWOMBEKI ..... 5<sup>th</sup> RESPONDENT**

**MBASI TRADING COMPANY LIMITED ..... 6<sup>th</sup> RESPONDENT**

**RULING**

26<sup>th</sup> Mar & 30<sup>th</sup> Mar, 2020.

**E. E. KAKOLAKI J**

Before this court, the applicant has filed a Chamber Summons supported by affidavit of Major Timothy Magege the 1<sup>st</sup> applicant and principal

officer of the 2<sup>nd</sup> applicant. The application has been preferred under Order VIII Rule 1(2), section 95 of the Civil Procedure Code [Cap. 33 R.E. 2002] and any other enabling provisions of the law, praying for the extension of time within which to file the amended written statement of defence in respect of Land Case No. 69 of 2016 out time.

Briefly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents who are also 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in Land Case No. 69 of 2016 are suing the 1<sup>st</sup> and 2<sup>nd</sup> applicants in this application as 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally together with 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents herein as 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> defendants respectively seeking for nullification of sale of their properties in CT. No. 186255, L.O No. 64949, Plot No. 116, Block 47, located at Kijitonyama, Kinondoni Municipality and CT No. 26118 L.O No. 65023, Plot No. 255 Bock "A" located at Sinza Area, within Kinondoni Municipality, which properties are alleged to be sold or caused to be sold unlawfully by the defendants following the 2<sup>nd</sup> applicant default to repay the loan advanced to her by the 3<sup>rd</sup> respondent.

The 2<sup>nd</sup> applicant facilitated by the 1<sup>st</sup> applicant secured loan from 3<sup>rd</sup> respondent being guaranteed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent who mortgaged their two above cited properties as securities for the said loan. Defaulting to repay the loan the 3<sup>rd</sup> respondent successfully sued the 1<sup>st</sup> and 2<sup>nd</sup> applicant (now 1<sup>st</sup> and 2<sup>nd</sup> Defendants) and obtained a decree of the court which on its execution engaged the 4<sup>th</sup> respondent who successfully sold the two mortgaged properties to the 5<sup>th</sup> and 6<sup>th</sup> respondents. It is from that sale the 1<sup>st</sup> and 2<sup>nd</sup> respondent (plaintiffs in the main suit) sued the 1<sup>st</sup> and 2<sup>nd</sup> applicants in this application as 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally together with 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents herein as 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> defendants respectively

seeking for nullification of sale of their properties in Land Case No. 69 of 2016 allegedly conducted fraudulently. All defendants including the applicants filed their written statement of defence. On 26/11/2017 the plaintiffs who formerly had not joined the 5<sup>th</sup> and 6<sup>th</sup> respondents as defendants craved leave of the court to amend the plaint in order to join them. After amendment of the plaint all defendants except the applicants filed their amended written statement of defence in accordance with the court's schedule.

When the matter came for final pre-trial conference the applicants who are the 1<sup>st</sup> and 2<sup>nd</sup> defendants in Land Case No. 69 of 2016 appeared unrepresented through the 1<sup>st</sup> defendant and notified the court that they wished to file their amended written statement of defence as it was important for the determination of this matter. The court ordered them to file a formal application which was filed on the 18/03/2020 and the application set for hearing on the 26/03/2020.

On the 26/03/2020 when the matter came for hearing before me both applicants appeared unrepresented through the 1<sup>st</sup> applicant whereas 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by **Mr. Aloyce Komba**, learned advocate who also happened to hold brief for **Ms. Gloria Benne**, learned advocate for the 5<sup>th</sup> and 6<sup>th</sup> respondents whereas **Ms. Irene Mshao** learned advocated appeared for the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The application was not contested by all respondents.

As introduced earlier this application has been preferred under Order VIII Rule 1(2), section 95 of the Civil Procedure Code [Cap. 33 R.E. 2002] and any other enabling provisions of the law. Now is this court properly moved under those provisions of the law? My response to the

question above would be no for two reasons. First, Order VIII Rule 1(2) of the CPC could not be invoked to move this court to grant the orders sought as it covers a situation where the defendant has failed to present his written statement of defence within twenty one days from the date of service of a notice to file a defence and thus seeks an extension of time to file the same. The provision under sub rule 2 allows extension of time only where the application is made within twenty one days after expiration of the first twenty one days and not otherwise. The provision in my opinion does not cover the application for filing amended written statement of defence. To appreciate the gist of my considered view Order VIII Rule 1(2) reads:

*Rule 1(2) Where a summons to file a defence has been issued and the defendant wishes to defend the suit, he shall, within twenty one days of the date of service of the summons upon him present to the court a written statement of his defence:*

***Provided that, the Court may, within twenty one days of expiration of the prescribed period, grant an extension of time for presentation of the written statement of defence on application by the defendant.*** (emphasis supplied)

Now what provisions should the applicants have had invoked when applying for extension of time to file the amended written statement of defence? My considered view is that though no express the provisions of Order VI Rule 17 of the CPC would be applicable in this application as

the same allow parties to the suit to amend their pleadings already filed. The same reads:

*17. The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*

It is not in dispute that prior to amendment of the plaint by the plaintiffs; the 1<sup>st</sup> and 2<sup>nd</sup> applicants in this application who are the 1<sup>st</sup> and 2<sup>nd</sup> defendants in Land Case No. 69 of 2016 filed their joint written statement of defence. Since they had their written statement of defence already filed what the applicants ought to have done was just to apply to this Court under O.VI R.17 of the CPC to amend their pleadings by filing amended written statement of defence. As the provision used to move this court is Order VIII Rule 1(2) of the CPC, I have no doubt to hold that this court was wrongly moved by citing a wrong provision of the law. Then what is the effect of wrong citation of the law? The Court of Appeal in the case of **Godfrey Kimbe Vs. Peter Ngonyani**, Civil Appeal No. 41 of 2014 (unreported) provided the answer. The Court had this to say:

*"It is trite law that wrong citation of the provisions under which the application is made makes the application incompetent and must be struck out. That this is the law, has been held in a number of decisions some of which have been cited by the respondent. In **Chama cha Walimu Tanzania Vs. the***

**Attorney General**, Civil Application No. 151 of 2008 (unreported) for instance, the court held:

*“... non citation and/or wrong citation of an enabling provision renders the proceedings incompetent. Decisions by this Court in which this principle of law has been enunciated are now legendary. Most of them are cited in the case of **Edward Bachwa & 3 Others Vs. the Attorney General & Another**, Civil Application No. 128 of 2006. The list may be added:*

- i. **Fabian Akoonay Vs. Mathias Dawite**, Civil Application No. 1 of 2013 (unreported) and*
- ii. **Harish Jina by His Attorney Ajay Patel Vs. Abdulrazak Jussa Seieman**, ZNZ Civil Application No. 2 of 2003”*

Secondly, the applicants wrongly cited the law as Civil Procedure Code, [Cap. 33 of the R.E 2002] which is no longer in existence as it has been replaced by the revised edition of 2019 made through the Law Revision Act Chapter 4 and published in the Government Gazette Notice No. 140 of 28/02/2020. Paragraph 2 of the said notice reads:

*2(1) The laws specified in the schedule to this Notice have been revised and published as 2019 Revised edition and have incorporated amendments including and up to November, 2019.*

***(2) The 2019 Revised Edition supersedes all previous Revised Edition in respect of the laws specified in the schedule.*** (emphasis supplied)

The 2019 Revised Edition laws having the superseding effect to the 2002 revised edition in respect of the laws specified in the schedule to the said Government Gazette, I am of the view that the applicant when filing this application on the 18/03/2020 ought to have referred the 2019 revised edition. However, the effect of this error in my opinion is not fatal to the extent of affecting the competence of this application in which case the remedy would be to order amendment of the referred 2002 revised edition and replace it with the Revised Edition of 2019.

In the premises and after considering the fact that the applicants have wrongly moved this court with wrong citation of the provisions of the law the only option would be to strike out the application. However, I have considered the fact that every case must be decided basing on its own merits and the fact that this application is uncontested. To strike it out in my humble opinion would not be in the interest of justice and might delay the disposal of this case. The applicants apart from citing a wrong provision of the law to move this court which is O. VII R. 1(2) of the CPC they also cited section 95 of the CPC as an enabling provision. Now a novel question is that can section 95 of the CPC, save the day? The section provides:

*S. 95. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

Section 95 of the CPC though a general provision, this court has unfettered jurisdiction to make any order for the purposes of meeting the ends of justice particularly where there is no express or specific provision to cater for that scenario. As already stated above O. VIII R. 1(2) of the CPC does not move this court to grant the prayers in this application. Since the application stands uncontested and the fact that the main suit is pending in court since 2016 and after considering the fact it is the intention of this court to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes as well as timely disposal of the proceedings, I am convinced that this is one of the case where the principle of overriding objective enunciated under section 3A and 3B of the CPC would be fit to apply. In that regard, I am of the firm view that section 95 of the CPC can save the day for the purposes of meeting the ends of justice and timely disposal of the proceedings of the main suit Land Case No. 69 of 2016. That is so because the order for filing the amended written statement of defence in my opinion if granted will serve the purpose of determining the real questions in controversy between the parties timely. The applicants being beneficiaries of the loan are expected if allowed to file their amended written statement of defence to tell whether the secured loan was repaid or not the fact which will assist the court to determine the real questions in controversy between the parties in Land Case No. 69 of 2016.

Having so found let me consider grounds for the delay in filing the application by the applicants. The applicants delayed to file the amended written statements of defence for more than two year. The reasons advanced by the applicants in the affidavit for such inordinate delay is that the 1<sup>st</sup> applicant who is also a principal officer of the 2<sup>nd</sup> applicant



being a resident of Kigoma Region instructed his advocate one **Gerald Hamisi** to file the defence but unfortunately he failed to do so for lack of sufficient information to prepare the document. That on 25/06/2018 he had to engage another advocate one **Loveness Karumbete** who also could not apply to file the amended written statement of defence as she ceased to practice as advocate after being employed as a magistrate. That thereafter parties were busy dealing with preliminary objections. And that at all that time no ex-parte order has ever been entered against the applicants. The 1st applicant concluded in his affidavit at paragraph 9 stating that as resident of Kigoma Region and due to economic crisis could not be able to come to Dar es salaam timely to sign the pleadings. This application being not contested by all respondents I conclude that all facts and reasons advanced by the applicants for their failure or delay to file the amended written statement of defence are undisputed thus reasonable. Considering the fact that this court has powers to grant the prayers coupled with the reasons advanced by the applicants and the need to meet the ends of justice by speeding up disposal of trials, I have no reason to deny the applicants that opportunity of filing their amended defence.

In the end and for the foregoing reasons, I would allow the application as I hereby do by extending time within which to file the amended written statement of defence in respect of Land Case No. 69 of 2016 out time as prayed. The applicants have to do so within 21 days from the date of this ruling. No order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 30<sup>th</sup> day of March, 2020.



E.E. KAKOLAKI

**JUDGE**

30/03/2020

Delivered at Dar es Salaam today on 30/03/2020 in the presence of **Mr. Benson Ngowi** advocate for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, **Mr. Fredrick Massawe** advocate for the 3<sup>rd</sup> and 4<sup>th</sup> respondents and **Ms. Gloria Benne** advocate for the 5<sup>th</sup> and 6<sup>th</sup> respondent, Ms. Lulu Masasi, Registry Officer and in the absence of the Applicants.



E. E. Kakolaki

**JUDGE**

**30/03/2020**