IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

MISC LAND APPLICATION NO 6 OF 2019

(Arising from Misc. Land Application No. 42 of 2018.)

MASISTA WA MTAKATIFU FRANSISC0

WA UTAWALA WA KIKRISTO.....APPLICANT

VERSUS

GEORGE WILLIAM MBAKO..... ...RESPONDENT

RULING

Date of the last Order: 3/4/2020
Date of the Ruling: 17/4/2020

MKWIZU, J.

The Applicant, **MASISTA WA MTAKATIFU FRANSISC0 WA UTAWALA WA KIKRISTO** filed a Chamber Summons praying for an order to set aside dismissal order in Misc. Land Case No. 42 of 2018 dated 18th December, 2018. The Application is supported by an Affidavit sworn by BAKARI CHUBWA MUHEZA the Applicant's advocate.

The application was opposed. Apart from filing a counter affidavit, Respondent's advocate had on 5th February,2019 filed a notice of preliminary objection that the court has not properly moved as the application contains wrong citation of enabling law and that the applicant is

misusing the court processes. At the hearing, and after a brief dialogue with the court, the counsel for the respondent abandoned the second preliminary point of objection as its determination would have called for analysis of facts.

When the application came up for hearing on 3rd April 2020, Mr. Bakari Chubwa Muheza learned counsel appeared for the Applicant whereas the Respondent was assisted by Mr. Frank Samwel also learned advocate.

As the practice of the Court has it, I had to determine the preliminary objection first before going into the merits of the application. However, in view of serving time of the Court as well as that of the parties the court thought it proper and parties agreed that the substantive application should be heard along with the preliminary objection. And that, in the course of composing the ruling, should the Court find the preliminary objection meritorious, it will sustain it and that will be the end of the matter. However, should it not, the court will over rule it and proceed to compose the ruling on the merits of the application.

Submitting in support of the preliminary objection, Mr. Frank Samwel, counsel for the respondent stated that application was brought under section 95 of the Civil procedure Act. The section is only applicable where there is no any other applicable law. In this case, he said, the proper law ought to have been cited is Order IX rule 8 and 9 of the CPC. He requested the court to strike out the application for being incompetent.

On his part, Mr. Bakari Muheza for the applicant opposed the raised objection. He contended that, Order IX rule 9 deals with the setting aside of a suit and not an application. The case that was dismissed by the court was a land application. He prayed for the dismissal of the Po.

The objection to this application is centered on the interpretation of the provision of Order IX rule 8 and 9. Order IX Rule 8 provides:-

> *"Where the defendant appears and the **plaintiff does not appear** when the suit is called on for hearing, the court shall make an order that the **suit be dismissed** unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder" (Emphasis added)*

applies on suits while he was applying to setting aside dismissal order in a land which has no direct provision to cater for the situation.

As it can be gleaned from the two provision above, the concern is on suits and not application. It is on the records, and not disputed by the respondent's counsel that what was dismissed by the court was a land application . Not a suit. The provisions of order IX of the Civil Procedure Code deals with suits. Not applications. In the book, Civil Procedure with limitation Act, 1963, 7th Ed., Eastern Book Company by Justice C.K Takwani, at page 159 a suit is defined as:-

> *"...a generic term of comprehensive signification referring to any proceeding by one person or persons against another or others in a court of law wherein the plaintiff pursues the remedy which the law affords him for the redress of any injury or the enforcement of a right, whether at law or equity.* ***Ordinarily, a suit is a civil proceeding instituted by the presentation of a plaint"*** *(Emphasis added)*

In the present situation the matter was dismissed when it came before the court for mention for the first time and secondly, the matter was not a suit for the purpose of Order IX rule 8. In the High Court case of **Kobil Tanzania Limited v Mariam Kisangi and Another,** Commercial Application No. 12 OF 2007 (unreported), it was stated as follows:

> *"In a situation where there is no procedure to cater for a certain situation, the court is obliged to use its common sense, justice, equity and good conscience and resolve the problem before it to further the interests of justice and prevent abuse of the process (See SARKAR ON CODE OF CIVIL PROCEDURE 10th ed. p. 9). And that is the philosophy behind the court's inherent powers under s. 95 of the Civil Procedure Code Act 1966."*

The above decision read together with the principle of overriding objectives suggests that citing the provisions of section 95 alone do not render the application incompetent under the circumstance of this case. I t could have been different if there was a direct provision to cater for the situation under scrutiny.

The cumulative effect of the foregoing discussion is to render the preliminary objection without merit. It is thus overruled.

The second part of this ruling is the decision on the substantive application, the preliminary objection having been over ruled.

On the main application Mr. Muheza, applicant's counsel, first adopted the contents of his affidavit in support of the application and added that, on the night prio to 18th December,2018 when the application was coming in court, he felt sick and therefore was unable to travel to Shinyanga. He, then asked another advocate to hold his brief but was refused by the court as he was not in a court attire. The learned counsel also submitted that, the application was dismissed on its first day it appeared before the court and that respondent was yet to be served with the application. Mr. Muheza asked the court to grant the application so that parties can be heard on the merit.

On his part, Mr. Frank , advocate for the respondent, opposed the prayer. He as well adopted his counter affidavit. He was of the view that applicant has failed to give reason why both, the advocate and his client failed to

appear before the court of the fateful date. He was of the view that the applicant was misusing the court as, respondent was yet to be served with the application to the date when the application was dismissed for non-appearance. He knew of its existence while making follows up of the decision connected to the said application. He prayed for the dismissal of the application with costs.

In his short rejoinder, Mr. Muheza, learned counsel for the applicant, submitted that his client could not appear as he had an important prayer to make in connection with the service of the application to the respondent whose whereabout was unknown. He insisted that, on that day he was sick and therefore unable to attend the court proceedings. She reiterated his earlier submissions.

My duty in this application is limited to considering whether the applicant was prevented by sufficient cause from appearing before the court when the application was called for hearing.

I have subjected the rival submission of the learned counsel for both parties to serious consideration they deserve. As correctly put by the

application was filed on 9/11/2018.On 12/11/2018 parties were all absent before, Hon. Mwaiseje Deputy Registrar who apart from setting the matter for mention on 18/12/2018 , she ordered the respondent to be served with the notice of hearing , the chamber summons and affidavit in support of the application. On 18th December, 2018, Respondent was yet to be served with the application on the reason as stated by the counsel for the applicant that his whereabout was unknown. This fact has got support from the respondent's counsel submissions and also is evidenced by the respondent's own prayer before the court when the matter came for mention where he was recorded thus:-

> "***Respondent***: *I have not been served with summons or the application. I come from Dar es salaam. I pray for dismissal of the application."*

Again, I have considered the decision in the case of **Jesse Kimani V. Mc Cornnell and Another** (1966) EA 547 at page 556 where it was decided that the application should be granted if the respondent would neither be prejudiced nor suffer any irreparable injury. It is also in the interest of justice and the practice of the court that suits are determined on merit unless there are special reasons to the contrary. See the case of **Fredrick**

Selenga V. Agnes Masele (1983) TLR 99.Having considered the circumstances of this case, I am of the considered view that there will be no harm to the respondent if this application is granted .The applicant has been all along diligent and vigilant in handling his application and thus no reason why parties should not be heard on merit.

The above said, this application is allowed, dismissal order dated 18th December, 2018 is set aside. The Misc. Land application No. 42 of 2018 is hereby restored to the court's register for continuation from where it stopped on 18th December,2018 when it was dismissed for want of prosecution. No order as to costs.

Dated at **Shinyanga** this **17th** day of **April**, 2020

E.Y MKWIZU
JUDGE
17/4/2020