

**“ORIGINAL”**

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
TANGA DISTRICT REGISTRY  
AT TANGA**

**MISC. CIVIL APPLICATION NO. 13 OF 2022**  
(ARISING FROM HIGH COURT OF TANGA, MISC. LAND APPLICATION NO. 45 OF 2021,  
ALSO LAND APPEAL NO 7 AND 8 OF 2019)

**MOHAMMED ENTERPRISES (T) LIMITED..... APPLICANT**

**VERSUS**

**M/S DINDIRA TEA ESTATES LIMITED.....1<sup>ST</sup> RESPONDENT**

**BALANGAI ESTATES LIMITED.....2<sup>ND</sup> RESPONDENT**

**THE REGISTRAR OF TITLES.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING ON PRELIMINARY OBJECTION**

Date of RULING- 29<sup>th</sup> JULY 2022

**Mansoor, J:**

The applicant applied for Review of the order passed by this Court on 16<sup>th</sup> March 2022 in which Misc. Land Application No. 45 of 2021 was dismissed for nonappearance of the Applicant. The application was made under Section 78 as well as Order XLII Rule 1 (1) (a), (b) and 3 of the Civil Procedure Code. The grounds for Review were that the decision contains mistakes/errors apparent on the face of records in that the



matter was dismissed on a date the same was fixed for mention contrary to law, and that the 3<sup>rd</sup> and 4<sup>th</sup> respondents were duly served.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application and brought to the attention of the Court a preliminary objection stating that there was a violation of Order IX Rule (6) of the Civil Procedure Code, and they prayed for the application for review to be struck out with costs. The objection was determined by written submissions.

The principal point which requires consideration in this case is whether a Court can, in exercise of the power of review under section 78 and Order XLII of the Civil Procedure Act set aside an order of dismissal for default or for nonappearance of the parties. The application was dismissed for default under Rule 5 of Order IX of the Civil Procedure Code. How can the court be moved to restore the application which was dismissed for default?

The facts necessary to appreciate the points which must be considered are these. The applicant in this application, who

was also the applicant in Land Application No. 45 of 2021 did not enter appearance in court on 16<sup>th</sup> March 2022, the dates fixed for attending to the application. On that date, the 1<sup>st</sup> and 2<sup>nd</sup> respondents appeared, but the applicant did not appear. The application was called out; but no one responded on behalf of the applicant. It was therefore, dismissed for default.

The applicant filed an application for reviewing the order of dismissal alleging that there were errors apparent on the face of the order of dismissal, in that the application was dismissed on the date the matter was fixed for mention. The 1<sup>st</sup> and 2<sup>nd</sup> respondent's objection are that the applicant ought to have filed an application under Rule 6 of Order IX of the Civil Procedure Code for an order to set aside the dismissal of the suit/application.

I followed the submissions made by the applicant regarding the provisions of Order IX Rule 6 of the Civil Procedure Code, that the word used in that Rule is “may”, and that the party wishing to set aside the dismissal order may apply for an order to set aside the dismissal. The Counsel for the applicant



argues that since the word used in the rule is “may”, then under section 53 (1) of the Interpretation of Laws Act, Cap 1 R: E 2019, then the power of the court is discretionary, and that the party wishing to apply to set aside the dismissal order may apply or may not apply. He is correct, but the discretionary power is given to the court, and not to the party.

The applicant’s counsel also argues that the order of dismissal for default is appealable without first applying to set it aside. The Counsel refers to the case of **Dangote Industries Limited Tanzania vs Warnercom (T) Limited, Civil Appeal No. 13 of 2022 at page 7/8**. With due respect to the counsel for the applicant, this decision is with regards to an exparte judgement, and a decree passed exparte, that the exparte judgement is appealable without attempting to set it aside.

The application was dismissed under Order IX Rule 5 of the Civil Procedure Code, the remedy available is only under Order IX Rule 6 of the same code, and the Court would have power to set aside the dismissal of the matter and restore it. This

application for review under Section 78 (1) and Order XLII of the Code should have been employed after the Court had refused the applicant an order to set aside the dismissal order, and refusal to restore the application. The Counsel for the Applicant has put forward the argument that an appeal lies under Order XL of the Code against an order rejecting an application under Rule 6 of Order IX in a case open to appeal, and that the appeal lies irrespective of whether the application is rejected on merits or is dismissed for default.

Firstly, no appeal lies against an order of dismissal for default under Rule 5 of Order IX, though an appeal lies against an order whereby an application to set aside the dismissal order made under Order IX Rule 6 is rejected on merits. I agree that a Court has inherent jurisdiction to do justice, and that it can restore an application under Rule 6 of Order IX in exercise of that jurisdiction, but an aggrieved party must apply for setting aside the dismissal order before the court which dismissed it.

An application under Rule 6 is filed when a suit is wholly or partly dismissed under Rule 5. That rule provides for dismissal

of a suit when at the time of its being called on for hearing, the defendant appears, and the plaintiff does not.

An appeal lies from some orders including those passed under any of the rules when an appeal is expressly allowed by the rules and from no other orders. Rule 1 of Order XL enumerates the orders passed under the rules from which appeals lie. Under Rule 1(c) of Order XL, an appeal lies from "an order under Rule 6 of Order IX rejecting an application, (in a case open to appeal) for an order to set aside the dismissal of a suit. It be noted that there is an error in the CPC as the provision for setting aside the dismissal order for default is Rule 5, and a party wishing to set aside the dismissal order has to apply for restoration of the suit under Rule 6. Rule 9 is for setting aside exparte decrees.

The situation here is not an exparte decree as there is no exparte decree passed. The issue here is the dismissal of a suit/application for default, i.e., the party failed to appear when the matter was called out for hearing or mention. The difference is clear being that in the present application we are



dealing with the 'dismissal of a suit' and the cases referred to by the applicant's counsel are dealing with 'a decree passed ex parte.' I agree and as correctly ruled out by the superior court that an appeal lies against the decree passed ex parte without first applying to set aside the ex parte decree, but the dismissal order for default is not appealable and one has to apply to set it aside first, and when the application for setting aside the dismissal order is rejected, then an appeal lies against that order of rejection to set aside the dismissal order. The dismissal order passed under Rule 5 of Order IX of the CPC has no force of a decree because the legislature did not intend to make the order subject to an appeal but intended the Court which passed the order to act under Order IX Rule 6 for the purpose of setting aside the dismissal. The legislature intended that the Court dismissing an application under Rule 5 of Order IX for default should itself have a general power to restore it on being satisfied that such restoration was necessary in the interests of justice. Rule 1(c) of Order XL provides for an appeal against an order rejecting an

application under Rule 6 of Order IX and not against an order of dismissing a suit/application.

Again, section 78 of the CPC the review can only be preferred when an appeal is allowed but not preferred. This section reads:

*78.-(1) Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved-*

*(a) by decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is allowed by this Code, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

*(2) Notwithstanding the provisions of subsection (1), no application for review shall lie against or be made in respect of any preliminary or interlocutory decision*



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*or order of the Court unless such decision or order has the effect of finally determining the suit.*

Thus, the application for review of the dismissal order of which no appeal is allowed but which there is a special remedy given under the code cannot be reviewed. This becomes apparent from the fact that Section 78 of the Civil Procedure Code, 1966, the High Court has been vested with an express power to review any judgment or order pronounced 'or made by it. The power of review which is possessed by the High Court is wide and unfettered but can be exercised only when there is an error apparent on the face of the records and where there are no other remedies available under the act. I, therefore, hold that this application is not maintainable, and it is accordingly dismissed.

Application for review dismissed with costs.

DATED at TANGA this 29<sup>TH</sup> day of JULY 2022



**L. MANSOOR**

**JUDGE,**

**29<sup>TH</sup> JULY 2022**