

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

MISC. CIVIL APPLICATION NO. 16 OF 2023

(Arising from the Civil Case No. 22 of 2016 in the High Court of Tanzania at Mwanza)

**THE REGISTERED TRUSTEES OF THE
KHOJA SHIA ITHNASHERI (MZA) JAMAATAPPELLANT**

VERSUS

MRS. FAKHARIA SHAMJIRESPONDENT

RULING

22th February & 24th February 2023

Kilekamajenga, J.

The applicant, through the legal services of the learned advocate, Mr. Leonard Silvanus Joseph lodged the instant application seeking an order to set aside an *exparte* judgment dated 6th December, 2022 in Civil Case No. 22 of 2016 which proceeded by way of *exparte* proof against the applicant. The application was made under **Order VIII Rule 14 and 15(1)** and **Section 95 of the Civil Procedure Code, Cap. 33 R.E. 2019** and other enabling provisions of the law. The application is accompanied with an affidavit deposed by Arshad Jetha who is the applicant's Principal Officer. In response, the respondent filed a counter affidavit resisting the application.



In hearing the application, the counsel for the applicant prayed to adopt the affidavit in support of the application. He further invited the court to the case of **Zein Mohamed Bahroom**, Misc. Land Application No. 307 of 2017. In support of the referred case, he argued that the decision of the Deputy Registrar may be challenged by way of revision, review or appeal but not through a point of preliminary objection. He further referred the court to the case of **Songea Satom Company V. Barclays Bank of Tanzania and two others**, Misc. Civil Reference No. 15 of 2021 which also insisted on the above position of the law. He argued further that, the applicant was denied the right to be heard as the written statement of defence was filed within time after the order of the Deputy Registrar. In his final prayer, the counsel urged the court to set aside the *ex parte* judgment given by this court.

In reply, the learned Counsel for the respondent, Mr. Silvanus Mayenga prayed to adopt the respondent's counter affidavit and further argued that the legal authorities submitted by the counsel for the applicant are misplaced. He insisted that, the applicant filed the Written Statement of Defence out of time and that, the order given by the Deputy Registrar was not a blanket order. The applicant was supposed to comply with the law in filing the contested Written Statement of Defence. The counsel further argued that, the ruling given by Honourable Kahyoza, Judge which rejected the Written Statement of Defence was not an



ex parte ruling as the applicant was fully heard before the pronouncement of the ruling. Therefore, the applicant was not denied the right to be heard. The applicant has no right to set aside the *ex parte* judgment as there are other avenues to take.

When re-joining, Mr. Leonard insisted on the applicant's right to be heard as a result of striking out the Written Statement of Defence.

In this case, I find it apposite to summarise the brief facts leading to this application. The respondent filed a suit against the applicant vide Civil Case No. 22 of 2016. In the course of hearing the case, the applicant filed the written statement of defence after being given extension of time by the Deputy Registrar. However, such filing of the Written Statement of Defence was challenged through a point of objection that prompted the trial judge to deliver a ruling. I wish to revisit the decision in the ruling in respect of the objection. The trial judge stated that:-

"The Deputy Registrar had mandate to extend time to file the Written Statement of Defence for a period not more than 21 days. Whether, the Deputy Registrar stated the extension period or not, the trustees were bound to file the Written Statement of Defence within 21 days. The Deputy Registrar had no mandate to extend time to file the

Written Statement of Defence for 54 days. The Deputy Registrar's order extending time to file the Written Statement Defence for 54 days was violation of the law".

It is therefore clear, the decision made by this court in the above ruling renders this court *functus officio* to reason contrary to its erstwhile decision, and go further to set aside the judgment. Following the above decision, the applicant lost the right to be heard and the main case was decided without the applicant's evidence. I hereby dismiss the application with costs. Order accordingly.

DATED at **Mwanza** this 24th day of February, 2023.



Ntemi N. Kilekamajenga.

JUDGE

24/02/2023



Court:

Judgment delivered this 24th February 2023 in the presence of Mr. Kulwa Samson, the advocate for the applicant but in the absence of the respondent.



Ntemi N. Kilekamajenga.
JUDGE
24/02/2023

