

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

MISCELLANEOUS APPLICATION NO. 15 OF 2023

(Arising from the ruling in Civil Case No. 30 of 2022, dated 30th Dec, 2022)

ATTORNEY GENERAL 1ST APPLICANT

THE BOARD OF TRUSTEES OF NATIONAL

SOCIAL SECURITY FUND..... 2ND APPLICANT

VERSUS

OBADIAH MJARIFU

T/A KELLU HILL SECONDARY SCHOOL RESPONDENT

RULING

16th June, 2023

CHABA, J.

This is an application to set aside ex-parte order of this court dated 30th day of December, 2022 through Civil Case No. 30 of 2022. The application was made and taken out under Order V, Rule 1 (1) of the Civil Procedure Code [CAP. 33 R. E, 2019], in which the applicants are moving the court for the following orders: -

- a) That, this Honourable Court be pleased to make an order to set aside the ex-parte order dated 30th December, 2022 against the 2nd Applicant;
- b) That, the costs of this Application be provided for;
- c) Any other relief (s) this Honourable Court deems fit to grant.

As background, the respondent who is the plaintiff in the main suit registered as Civil Case No. 30 of 2020 sued the applicants in that main suit for an order to nullify the contributions claim and demand notice of TZS. 78,622,000/= and penalty of TZS. 4,434,500/=, liquidated damages amounting TZS. 250 million, costs of the suit, payment of general damages, an order for payment of interest at Court's rate from the date of judgment till payment of the decretal sum, and any other relief this Court would deem fit and just to grant.

As gathered from the court records, the plaintiff filed the plaint against the defendants on 19/10/2022 whereby according to the court's scheduled orders, the defendants were required to file their written statement of defence within twenty one (21) days, that is on or before 09/11/2022 but they delayed to file the same until when the matter came up for mention on 12/12/2022, which is almost two months from the date they were served with the summons to file their written statement of defence.

So, when allowed to show cause as to why she delayed to file her written statement of defence within the prescribed time, the 1st defendant failed to advance good cause for the delay, hence on 30th December, 2022

I struck out from the record the written statement of defence and ordered the matter to proceed ex-parte.

Dissatisfied by that order, on 26th January, 2023, the applicants knocked the doors of this court intending to challenge the decision of the court which was delivered in favour of the respondent, as indicated above.

Thus, when the application was called on for hearing on 27th March, 2023, the respondent informed this court that he filed a preliminary point of objection and stated that he would wish to argue the same before the matter set for hearing of the main application. On his part, Mr. Baraka Mgya, the learned State Attorney for the applicants had no objection.

Arguing in support of the raised preliminary objection on a point of law, the learned counsel for the respondent, Mr. Deus Nyabiri submitted that, in essence the applicants filed the instant application seeking for an order to set aside the ruling issued by this court on 30th day of December, 2022. In so doing, the applicants cited the provision of Order V, Rule 1 (1) of the Civil Procedure Code [CAP. 33 R. E, 2019] which provides that:

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"Where a suit has been dully instituted a summon may be issued to the defendant at the time when the suit is assigned to a specific judge or magistrate pursuant to the provisions of Rule 3 of Order IV to file in accordance with

sub rule (1) of the Rule 1 of Order VIII, a written statement of defence”.

In his view, the above provision simply provides procedure to be followed after the suit is instituted, regarding issues of summons to the defendant and issue of filing of defence, and that it has nothing to do with setting aside an order of the court.

To reinforce his argument, the learned counsel referred this court to the case of **Leila Meghili t/a Le House Enterprises Vs. International Bank of Tanzania** (Commercial Division), Miscellaneous Commercial Cause No. 328 of 2014, (unreported), and proceeded to submit that, by citing a provision which is not relevant to the order applied for, makes an application incompetent and liable for being striking out from the court record.

As regards to what to do with an incompetent application, the counsel cited the authority in the case of **Burhan Abdul Karim t/a E.A.K. Enterprises Vs. NBC Jamhuri Branch, Bukoba**, Civil Application No 7 of 1996 (unreported) where the Court held: -

“The incompetency means there is no application before this court which can be withdrawn, amended or adjourned, consequently the application is rejected and instead it is

hereby ordered that the application be struck off the record with costs".

Based on the above authority, the counsel for the respondent prayed the court to struck out the application on the ground of being incompetent.

Countering the preliminary objection raised by the counsel for the respondent, the learned State Attorney for the applicants through the authority in the case of **Arusha Blooms Ltd & Another Vs. TIB Development Bank Ltd & Others**, Misc. Civil Application No. 809 of 2018 (unreported), submitted that citing a wrong provision of the law or omission to cite enabling provision does not render the application incompetent. He accentuated that, the authority in the case of **Jacob Magoiga Gichere Vs. Penina Juma**, Civil Appeal No. 55 of 2017, CA (unreported) at page 13, where the court held that the oxygen principle requires the court to deal with cases justly with regard to substantive justice. He therefore submitted that, the preliminary objection raised by the respondent has no merit and prayed the court to dismiss the same and grant leave to file written statement of defence.

In rejoinder, the counsel for the respondent submitted that, in principle the applicants do not deny the fact that they lodged their application by citing a non-applicable law but instead thereof prayed this

court to invoke the overriding objective principle without providing basis for it. To stress on the position of law as regards to the failure to cite relevant provision, the learned counsel referred this court to the case of **Gilbert Peter Sempombe Vs. Mariam Mussa Sengao**, Misc. Civil Application No. 20 of 2021 (unreported), where this Court observed that:

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"It is mandatory for chamber summons to contain the relevant enabling provision and not otherwise. Failure to cite relevant provision is fatal".

Mr. Nyabiri insisted that, in the present application, the enabling provision cited by the applicants do not support the prayers sought, hence reiterated his prayer that this application be struck out with costs.

Having carefully gone through the rival submissions and upon considering parties' pleadings, the main issue for consideration and determination is whether this application is misconceived and improperly before this Court.

I must hasten to point out that, as rightly submitted by the learned counsel for the respondent that this court has not been properly moved. Order XXI, Rule 10 (2) (j) (iii) of the Civil Procedure Code [CAP. 33 R. E, 2019] is a prescribing provision and not enabling provision and

undoubtedly there is a difference between the two. With the term prescribing provision, means a party is instructed what to do or procedure to be followed while enabling provision, is the provision clothing the court with authority to grant the relief or orders sought. **See: Hassan Sunzu Vs. Ahmad Uledi**, Civil Reference No. 8 of 2013 CAT, at Tabora (unreported) and **Awiniel Mtui & Others Vs. Stanley Ephata Kimambo**, Civil Application No. 19 of 2014, CAT at Arusha (All unreported).

Having so observed above, I am now set to determine the consequences of citing wrong or wrong citation of enabling provision of the law and its effect.

Whereas I agree with the learned counsel for the respondent that failure to cite proper enabling provision of the law is fatal, I am also alive to the fact that, the principle of overriding objective requires courts to deal with cases justly, speedily and to have regard to substantive justice. **(See: Yakobo Magoiga Gichere Vs. Peninah Yusuph (Supra), Gasper Peter Vs. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017, **Mandorosi Village Council & Others Vs. Tuzama Breweries Limited & Others**, Civil Appeal No. 66 of 2017 and **Njoka Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017).

The counsel for the applicants had the view that, the cited defect herein can be remedied by the overriding objective principle. However, the question that I feel inclined to answer is whether or not this court may proceed with the hearing of the application with the defective affidavit, though the same may be cured by the principle. In my considered view, the answer is negative. Certainly, I cannot close my eyes and act blindly on this issue for one reason that, parties to this case are represented by the learned trained minds persons whom from the beginning were involved in the preparation of documents and prosecution of the matter before this court.

For the above reasons, I have decided to strike out the application from the registry for want of proper record. However, I the applicants are hereby given fourteen (14) days from the date of this ruling to bring a fresh and proper application without any further delay. Each party to bear its own costs. Ordered accordingly.

DATED at MOROGORO this 16th day of June, 2023.




M. J. Chaba

JUDGE

16/06/2023