

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISC. CIVIL APPLICATION NO. 05 OF 2023

(Arising from Misc. Civil Application No. 2 of 2023 in the District court of Bunda at Bunda)

BETWEEN

OLYMPUS EDUCARE LIMITED..... APPLICANT

VERSUS

MASHAKA KIPILI 1ST RESPONDENT

ALEX S. MUGABO (MUGABO AUCTION MART & CO. LTD 2ND RESPONDENT

RULING

17th & 24th August, 2023

M. L. KOMBA, J.:

The applicant in this application at hand brought this application seeking for the following orders;

1. That, this honorable court may be pleased to call for the record of Civil application No. 02/2023 and Miscellaneous Civil Application No. 19/2022 to satisfy itself as to the correctness, legality and proprieties of the records and revise the same for the interest of justice.
2. That, Honorable court may be pleased to investigate the question of the value of the attached property located at plot No. 3 Block 'A'

Misisi Area Bunda Township so as to satisfy itself as to whether the property of more than Tzs. 2.4 billion Shillings can be attached to satisfy the decree of Tzs. 28,987,500/=.

3. That, this honorable court be pleased to order the applicant's secondary school be released from attachment in execution of the decree in Civil Case No. 7/2021 and as the applicant has many other properties of equivalent or slightly exceeding the decretal sum direct the same to be attached and the applicant be ordered to give co-operation to that effect.
4. Costs of this application be provided.
5. Any other relief this honourable Court may deem fit and just to grant.

The application was brought by way of chamber summons premised under section 79 (1) (b) and (c) and section 38 (1), Section 95, 68 (e) of the Civil Procedure Code Cap 33 [R.E 2019], and it is supported by affidavits of Victoria Kihogo, managing director of the applicant.

Upon being served with the application and affidavit, respondent filed Preliminary Objection on point of law that;

- 1. Owing to the fact that the Application (Misc Application no. 02 of 2023) subject of this revision application was dismissed for*

want of prosecution, this application has been preferred in contravention of the law.

During the hearing of this application the applicant was represented by Mr. Daudi Mahemba, the learned Advocate and on the other hand, the learned sister Suzan Jacob represented the respondents.

In her submission, Ms. Suzan informed this court that the main application was dismissed under Order IX rule 6 then the applicant filed Misc application no. 2 of 2023 which was not prosecuted and was dismissed for that reason. She further submitted that applicant was supposed to file application in the same court to set aside its order and not to file revision. To boost her stance, she cited the case of **Ntuta Loid vs. Magreth** Misc. Land Appeal No. 15 of 2021 this court (Mbeya HC) where the applicant had a room to apply to the same court. She submitted that so far as the application is wrongly filed, she prayed the same to be dismissed with costs.

Responding, Mr. Mahemba resisted the Objection on the ground that the order and rule regulate fresh suit and provide procedures when suit is dismissed. He submitted that in the district court there was no plaint and it was not a suit, it was application which is not governed by Order IX rule 6. He distinguished the case of **Ntuta Loid** (supra) that was

about appeal which was dismissed by want of prosecution. He said the district court was supposed to decide because affidavit was attached with application and what was supposed to do is to consider application and make decision. He then referred this court to the case of **Atuwonekye Mwenda vs. Ezron Mangula**, Misc. Land Appeal No. 5/2020 at page 18/19 High Court ruled that the matter of that nature was not subject to dismissal. He submitted that fact made him to march to this court. There was affidavit and District court was supposed to determine application. He prayed this court to overrule the Preliminary objection.

Apart from reiterate what submitted in chief, in rejoinder, the counsel for respondent submitted that the cited law is proper as the matter arises from the civil suit and the remedy was to apply to set aside. She further submitted that why did the court entertain the application which was not prosecuted.

Upon hearing of both parties' submissions, the issue for determination here is whether the preliminary objection has merit.

Order IX Rule 6 (1) of the Civil Procedure Code, CAP 33 [R.E 2019] provides;

6.-(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from

*bringing a fresh suit in respect of the same cause of action, but he may apply for an order to set the dismissal aside and, **if he satisfies the court that there was sufficient cause for his nonappearance** when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.*

Thus, as correctly argued by both parties that the matter was dismissed for want of prosecution. Ms. Suzan submitted that the remedy was to apply in the same court to set aside its dismissal order while Mr. Mahemba claim that the matter was supposed to be determined as there was affidavit.

Ms. Suzan submitted that right to be heard is fundamental right and no one shall be condemned without heard and finds filing of affidavit alone is not enough. She maintained that since the applicant failed to prosecute her case, she was supposed to apply to set it aside the dismissal order. Mr. Mahemba argued that there was no suit to warrant dismissal as the order cited is about the suit and not application.

Application No. 2 of 2023 originating from the civil suit just as submitted by counsel for the respondents and basing on the 1st school of thought in the case of **Atuwonekye Mwenda** (supra), I am of the position that

application is equal to the suit and therefore the order cited is relevant that failure to prosecute application the remedy is to dismiss just as was done in application No. 02 of 2023. The common practice is to set aside dismissal order.

Therefore, from what I endeavor to explain above, I am of the considered findings that the preliminary Objection is meritorious and is hereby sustained. The Civil Revision No. 05 of 2023 is dismissed with costs.

It is so ordered.



M. L. KOMBA

Judge

24 August, 2023

Judgement delivered in chamber today before Mr. Daudi Mahemba who represent the applicant and holding brief for Suzan Jacob, the counsel for the respondents.

M. L. KOMBA

Judge

24 August, 2023