

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 343 OF 2023

(Arising from the ruling and Order of High Court in Civil Case No. 232 of 2022,
dated 08/06/2023)

AYOUB ISSA KIDANGI.....APPLICANT

VERSUS

**PARTICIA ISMAIL MATOGO (Administrator of the
Estate of the late Ismail Elisali Nkya)..... RESPONDENT**

RULING

Date of Last Order: 30/08/2023.

Date of Ruling: 08/09/2023.

E.E. KAKOLAKI, J.

The applicant herein has moved the Court for three orders namely, **One** that, prior to hearing of the suit the Court be pleased to set aside its decision of 08/06/2023 ordering the case to proceed ex-parte against the applicant, **second**, grant the applicant with leave to file Written Statement of Defence and **thirdly**, any other relief which the Court may deem fit to grant. In the alternative the applicant prays this Court to strike out the suit. The application is preferred under Order VIII Rule 14(2), Order V Rule 1(2),

sections 3A(1), 3B(1)(a) and 93 and 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) and any other provisions of the law, supported with two affidavits duly sworn by the applicant himself and one **Dickson Venance Mtogese**, applicant's advocate, mainly advancing reasons as to why the sought prayers by the applicant should be granted. The reasons stated as discerned from both affidavits are that, **One**, service of summons to file defence was incomplete, concealed or fraudulently done, allegedly made to unknown person to the applicant to entitle the court proceed under Order VIII Rule 14(1) of the CPC, **second**, it was concealed or not addressed to the Court before entering ex-parte order against the applicant that, the applicant who had fell sick was at all material time represented by donee of power of attorney who is neither advocate nor officer of the Court, **thirdly**, applicant's failure to file written statement of defence did not result from negligence.

The application is strenuously contested by the respondent who filed his counter affidavit duly sworn by her advocate one **Peter Alfred Bana**, to that effect. It was respondent's reaction that, the application by the applicant is wanting in merit as he was made aware of the claims against him through summons before he appeared through appointed legal representative who

failed to file the defence despite of being extended with time to so do for 21 days. And that, upon expiry of the said 21 days the said legal representative negligently failed to apply for extension of time to file the WSD within prescribe time of 7 days, the result of which the Court rightly rejected the prayer for extension of time within which to file the WSD and proceeded to order for ex-parte hearing. In addition the respondent contends, this Court lacks jurisdiction to entertain the application by the applicant for enlargement of time within which to file the WSD for being functus officio, hence a call for the Court to struck it out.

The factual background of the present matter as garnered from the applicant's two affidavits are simple to tell. Before this Court in Civil Case No. 232 of 2022, the respondent filed a suit against the applicant claiming among other reliefs for a decree of Tshs. 1,120,000,000/= (say One Billion One Hundred and Twenty Million only). It appears on 14/02/2023 when served with the plaint through one Aziza Baraka, the applicant appointed one Goodluck Nicodemus Nicodemus under special power of attorney duly registered with Registrar of Title, as his lawful attorney and agent with full authority to prosecute the case instituted against him. The said representative who appeared in Court on 06/04/2023 without having the

Written Statement of Defence, successfully sought extension of time for 21 days within which to file the same on the ground that the applicant was sick in remote area so he needed time to reach him first. He was ordered file the WSD by 27/04/2023 while the matter set to come for mention on 16/05/2023, the day in which the trial judge was indisposed as a result parties appeared before the Deputy Registrar where the case was adjourned to 08/06/2023, for mention before the trial judge. On the 08/06/2023 when the matter was called in Court before the trial judge, the applicant/defendant's legal representative advanced the prayer for extension of time within which to file the WSD, the prayer which was vehemently objected by Mr. Bana counsel for the respondent on the ground that, it was made out of time, limit as the applicant ought to have filed a formal application with 7 days from the last date of extended period as prescribed by the law under Order VIII Rule 1(3) of the CPC, which he failed to do, the objection which was sustained and ex-parte proof order of the case issued against the applicant. Disgruntled the applicant preferred the present application fronting three grounds as enumerated above beseeching this Court to set aside the said ex-parte order/ruling and grant him with leave to file his WSD.

It is worth noting that being represented, both parties were heard in the form of written submissions in which their filing schedules were adhered to the letters. The applicant hired legal services of Mr. Dickson Venance Mtogesiwa while the respondent enjoyed representation of Mr. Peter Alfred Bana, both learned counsel.

I availed myself with ample time to consider the fighting submissions by both parties and accord them with the deserving weight. The main issue pending for determination is whether the application is meritorious. However, before dwelling into determination of the merit or demerits of the application, I find it incumbent for this Court to address and determine first the issue raised by the respondent as to whether the Court is functus officio to entertain the application before it. I so view as the issue raises a point of law which touches jurisdiction of this Court, in which the settled law is that it can be raised at any stage of the suit and that, if so raised must be determined first. See the case of **Shahida Abdul Hassanali Vs. Mahed M.G. Karji**, Civil Application No. 42 of 1999 and **Bank of Tanzania Vs. Dervan Valambhia**, Civil Application No. 15 of 2002 (CAT-unreported). In the case of **Shahida Abdul Hassanali** (supra), the Court of Appeal on when the raised preliminary objection should be determined had this to say:

"The law is well established that a Court seized with a preliminary objection is first required to determine that objection before going to merits or the substance of the case or application before it."

Addressing on the raised issue Mr. Bana contended that, much as the application for extension of time within which to file the WSD after lapse of extended 21 days by the applicant was refused by the Court for being brought out of time and ex-parte hearing order issued against him to that effect, this Court is functus officio to entertain the same application for leave to file WSD involving the same parties. He prayed the Court to strike out the application. In response Mr. Mtogesewa resisted the contention by Mr. Bana submitting that, the respondent is in gross error to plead functus officio as **first**, the same ought to have been raised as point of preliminary objection but opted to waive it. **Secondly**, the subject matter for determination in this application is to set aside the ex-parte order only, the application which has never been called into attention of this Court before for consideration and determination.

Now with the applicant's response should this Court disregard the issue of Court being **functus officio** as raised by the respondent merely because it was not formally or earlier on raised as preliminary objection? I think this

point should not detain this Court much as it is already demonstrated above that, the issue of whether this Court is *functus officio* to entertain the application touches jurisdiction of this court, hence can be raised at any point or stage of the suit. The first ground by the applicant I find is wanting in merit as I proceed to entertain the raised point or issue as to whether this Court is **functus officio** to entertain the application for leave to file the WSD by the applicant as raised by the respondent.

Having considered the rivalry submissions from both parties on the issue of the jurisdiction of this Court to hear and determine this application for being *functus officio* and in order to disentangle parties from locking horns on the subject matter, I find it incumbent to examine first what amounts to *functus officio*. This Court in the case of **Cipex Tanzania Limited Vs. Tanzania Investment Bank**, Civil Appeal No. 127 of 2018 (HC-unreported) had an opportunity to define the term ***functus officio*** to mean:

*"The term functus officio is a judicial context, **simply connotes that once a judge or magistrate has performed his official duty, he is precluded from re-opening the decision.**" (Emphasis supplied)*

With the above definition in mind the next question is when does the Court become *functus officio*? I think this question need not exercise my mind as there is a litany of authorities on the subject such as cases of **Kamundi Vs. R** [1973] EA 540, **James Kabalo Mapalala Vs. British Broadcasting Corporation** [2004] TLR 143, **Bibi Kisoko Medard Vs. Minister for Lands Housing and Urban Developments and Another** [1983] TLR 250 and **Scolastica Benedict Vs. Martin Benedict** [1993] TLR 1. On when does the court become *functus officio* to entertain the matter before it, this Court in the case of **Bibi Kisoko Medard** (*supra*), speaking through the late Mwakibete J (as he then was) held that:

"...in a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio."

From the above cited principle which I subscribe to, I am persuaded and it can simply be said that, a court becomes *functus officio* when it disposes of a case by a verdict of guilty or acquittal or by passing a sentence or rendering orders finally disposing of the case or parties' issue(s) in controversy on specific right. Now applying the above principle of law to the facts of this matter, I am at one with Mr. Mtogesiwa's submission that, applicant's

application/prayer for setting aside ex-parte hearing/order against him has never been heard and determined on merit by this Court. I only differ with his proposition that, that is the only application/prayer or subject matter pending for consideration and determination before the Court in this application as there is also a second application/prayer for leave to file Written Statement of Defence by the applicant as stated in item (ii) in the chamber summons, subject of discussion in the raised objection, leave alone an alternative prayer for striking out the suit. The first two applications for setting aside ex-parte hearing/order and leave to file the WSD by the applicant, in my considered view are interlinked and interdependent as granting of the former one depends much on the grant of the latter first, on the reason that, ex-parte hearing resulted from rejection of applicant's application for further extension of time to file WSD after expiry of formerly extended time of 21 days for being preferred out time, the same being brought in terms of Order VIII Rule 1(3) of the CPC, which application/prayer the applicant is once again bringing now as a second bite. For this application to be meaningful, then this Court must be crowned with jurisdiction to entertain both applications and more particularly the second application. As alluded to above, this Court never entertained and determined on merit

applicant's first application/prayer for setting aside ex-parte order of this Court in Civil Case No. 232 of 2022, dated 08/06/2023. The only remaining issue is whether the application for leave to file the WSD can also be entertain by this Court so as to meet the desired relief sought in the first prayer/application as prayed by the applicant for allegedly being functus officio.

From both affidavits and reply to counter affidavit in support of the application and the counter affidavit against it, it is uncontroverted fact that, on 06/04/2023, applicant's legal representative Mr. Goodluck Nicodemus Nicodemus, acting under special power of attorney, on 06/04/2023 appeared in Court and prayed for extension of time within which to file WSD, the prayer which was cordially granted and ordered to file the same within 21 days or by 27/04/2023, before the matter was scheduled for mention on 16/05/2023. It is also evident that, up to 16/05/2023 when the matter was called for mention before the District Registrar, twenty (20) days passed, the applicant had not complied with Court's order for filing the WSD nor filed a formal application within 7 days from expiry date of the formerly extended time to him in terms of Order VIII Rule 1(3) of the CPC, for extension of time within which to file WSD out of time or within ten (10) days, before the

matter was scheduled for mentioned before the trial judge on 08/06/2023, for necessary orders. It is also a plain fact that, when appeared before the trial judge on 08/06/2023 the said applicant's legal representative orally prayed for extension of time within which to file WSD after expiry of the formerly extended period of 21 days, the application which was rejected for being preferred out of time hence ex-parte hearing order against the applicant, following respondent's oral application to that effect. And that, the said order was arrived at in full compliance with the provisions of Order VIII Rule 14(1) of the CPC which reads:

*14.-(1) Where any party required to file a written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule 3 of rule 1, within the period of such extension, **the court shall, upon proof of service and on oral application by the plaintiff to proceed ex parte**, fix the date for hearing the plaintiff's evidence on the claim.*

In view of the above facts and law this Court is satisfied that, in as far as the issue of applicant's application for extension of time or leave within which to file WSD in respect of Civil Case No. 232 of 2022, is concerned, which ended up being refused after both parties were heard on merit and ex-parte order

issued to that effect, I agree with Mr. Bana that, the same was conclusively determined. I so hold as this Court in its ruling found that, the application for extension of time to file the WSD by the applicant was brought out of time after seven (7) days had passed following expiry of 21 days extended to him on 06/04/2023, thus in contravention of the provisions of Order VIII Rule 1(3) of the CPC, as no extension of time was ever sought by the applicant and granted before bringing that application. As the application for extension of time or leave to file the WSD was rejected by the Court on 08/06/2023, for being preferred outside time limitation after expiry of 21 days on 27/04/2023 within which to file the WSD and in absence of any application for extension of time to file the same preferred by the applicant and granted by the Court, I am persuaded that, this Court is precluded from re-opening its decision of 08/06/2023 by entertaining a similar preferred application by the applicant for leave to file WSD. It is on that basis I further embrace Mr. Bana's proposition that, this Court is functus officio to entertain the application for leave to file WSD involving the same parties and subject matter.

Much as the application for setting aside ex-parte hearing order entered on 08/06/2023 is inseparable with the application for extension of time to file

WSD after expiry of 21 days, which in this case ought to have been preferred after seeking extension of time to so do, and since this Court is functus officio to entertain the said application for leave to file WSD, I find this application is incompetent before the Court. This ground no doubt disposes of the application as I do not see how merit of the first application for setting aside ex-parte hearing order of this Court dated 08/06/2023, can be discussed and determined.

In the premises, I find this application is incompetent and proceed to struck it out with costs.

It is so ordered.

Dated at Dar es Salaam this 08th September, 2023.



E. E. KAKOLAKI

JUDGE

08/09/2023.

The Ruling has been delivered at Dar es Salaam today 08th day of September, 2023 in the presence of Mr. Dickson Mtogesewa, advocate for the applicant, Mr. Benedict Muta, advocate holding brief for Mr. Peter Bana, advocate for the respondent and Mr. Oscar Msaki, Court clerk.



E. E. KAKOLAKI
JUDGE
08/09/2023.

