

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

LAND CASE NO: 2 OF 2022

1. GLADNESS ALEXANDER ITAEL KWEKA

2. PETER ALEXANDER ITAEL KWEKA

(Both suing as Administrators of the
estate of the late ALEXANDER ITAEL KWEKA)

} **PLAINTIFFS**

VERSUS

MARY ALEXANDER ITAEL..... RESPONDENT

(As an Administrator of the estate of the late JANE ALEXANDER ITAEL)

RULING

14th & 27th March, 2024

A.P. KILIMI, J.:

The plaintiffs herein above being duly appointed as administrators of the estate of the late Alexander Itael filed this suit against the respondent herein who is also an administrator of the estate of the late Jane Itael Kweka the wife of the Alexander Itael claiming that the respondent in her administration has attached some of the deceased properties of their late father as the properties of the late Jane Itael Kweka. The suit properties are Plot No. 10 Block 'D' section III, located at Moshi Municipality with Certificate Title No. 056039/16 and the House (Farm Manager's House)

located at Farm: certificate of Title No. 11917 F.N. 334/6 (Karafuu Estate/Farm), within Siha District.

According to the record on 21/2/2023, Mr. John Kivuyo Lairumbe learned counsel representing the defendant prayed to amend the written statement of defence "hereinafter WSD". The same was not objected by Mr. Elikunda Kipoko learned counsel for the Plaintiffs. Before this suit went on merits, on 27/04/2023 Mr. Kipoko filed a notice of a Preliminary objection to the effect that *amended Written Statement of defence filed by the defendant on 5th April 2023 was filed out of time hence should be struck out*, hence this ruling.

To dispose the said preliminary objection both counsels with the leave of this court argued it by way of written submissions.

In support of the raised Preliminary objection, Mr. Kipoko submitted that on 21st February 2023 the respondent prayed for an order to amend her Written Statement of Defence where this court granted her prayers. The counsel submitted further that it took the respondent 42 days to file her amended WSD which legally it was like the defendant never filed any WSD as it was out of time for 28 days. To support his point the counsel

referred to Order VI Rule 18 of the Civil Procedure Code Cap.33 R.E.2019 "hereinafter CPC" and submitted that through such provision the respondent ought to file her amended WSD within 14 days. To cement on that, the learned advocate referred the decision of **Michael B. Masinde vs D.S Izina Alias Dhahiri Said Izina &3 Others** [2021] TZHC Land Division 6866 (TANZLII).

In reply opposing the raised Preliminary Objection, Mr. John Lairumbe contested and stated that the preliminary objection raised was devoid of merits and prayed the same to be struck out with costs as on 21st day of February 2023 the counsel for the plaintiffs was the one who raised that concern off record that the filed WSD failed to incorporate the names of the plaintiffs as it appeared on the plaint where on the same day the court granted an order to amend the said WSD. The counsel went on submitting that the defendant filed the amended WSD on 5th April 2023 and on 6th day of April 2023 the plaintiffs' counsel raised another concern that the amended WSD was also filed out of time leading the trial Judge Hon. Simfukwe to warn the counsel on unnecessary preliminary objections and technicalities instead on focusing to the root of the dispute.

The counsel further stated that it was from that, the plaintiffs lost faith on the trial Judge and wrote a letter to her, who then recused herself and the case was assigned to another Judge. The learned counsel further stated that the plaintiffs advocate being an officer of the court instead of aiding the court to reach a fair justice he was in total abuse of the court process, to support his assertion the counsel relied on the decision of **Regruzman (1968) 70 SR (NSW) 316,313.**

In respect to compliance with the order of the court for amendment of the WSD, Mr. Lairumbe argued that the defendant filed his WSD in time thus the order of the court was complied with, taking regard the said amendment order was without time limitation. In respect to the decision of **Michael B. Masinde** (supra) relied by the learned counsel for the plaintiffs, Mr. Lairumbe averred that it was distinguishable with this case at hand. The counsel further replied that since the order to amend WSD did not determine the rights of the parties as it is provided for under order VI Rule 17 of the CPC, then the principle of overriding objective brought by the Written Laws Miscellaneous Amendment No. 3 Act No.8 of 2018 comes into a play as it requires the courts to deal with cases justly by avoiding technicalities. To bolster to his point, the counsel invited me to refer the

decisions of **VIP Engineering and Marketing Ltd vs. Said Salim Bakhresa Ltd**, Civil Application No. 47 of 1996(Unreported), **Cropper vs. Smith** (18840) 26 CHD 700, **General Market Co. Ltd vs. A. A Shariff** (1980) TLR 61, **Khassim Mangwele vs. Republic**, Crm.App.No.29 of 1990, High Court at Dodoma and article 107A(2) of **The Constitution of United Republic of Tanzania Cap 2**.

In a rejoinder the learned counsel for the plaintiffs added that once amended pleadings were filed the previous pleadings ceases to exist and that the first filed WSD of the defendant ceased to exist the day amendments were made. The counsel further submitted that the overriding principle cannot operate where there is mandatory procedural law, to buttress this position he referred the decision of **Mondoroso Village Council and 2 others vs. Tanzania Breweries Limited and 4 others** Civil Appeal No 66 of 2017 CAT at Arusha (unreported).

Having heard the rival submissions in both sides done by their respective learned counsels in regard to the preliminary objection raised, the issue for determination is whether the raised Preliminary Objection has merits.

As per the records of this matter, it is not in dispute that the order to amend the WSD to the defendant was given without setting a time limitation by this Court on 21st Day of February 2023. The law is very clear in situation like this as under Order VI Rule 18 of the Civil Procedure Code Cap 33 R.E 2019 which provides that;

*"Where a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or **if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days**, as the case may be, unless the time is extended by the Court"*

[Emphasis is added].

As per the above provision, it states clearly that if the order to amend pleadings are given without setting time limitation which is the same as in the present matter, then any amendment is to be made within 14 days as rightly submitted by Mr. Kipoko. The records reveals that the amended WSD were filed by the defendant on this court on 6th day of April 2023 which is almost forty (40) days plus from the date an order was given

which was on 21st February 2023 and thus contrary to the above cited provision which requires the amendment to be done within 14 days. It could have been cured if the defendant sought for leave of this court for an extension of time after expiration of those 14 days instead of filing it after those statutory days without any order of this court.

I am also aware with the overriding objective principle as it was also submitted by the learned counsel for the defendant Mr. Lairumbe that the court ought to avoid technicalities in dispensation of justice, but I am of the considered view that the same are to be observed by not breaking the sets of rules and procedures provided for by our legislation as it was also correctly argued by Mr.Kipoko learned counsel for the plaintiffs when he referred decision of **Mondorosi Village Council and 2 others** (supra).

However, since each case must be decided basing on its own merits, in the instant matter despite the fact that the above provision which required the defendant to file her amendment within 14 days and is couched in mandatory, still the defendant did not account the other delayed days or even sought for leave for extension of time to file the amended WSD as the law provides above, thus, I am settled no any exception circumstances can be grasped from her contention. In my

opinion the law as above which provides mandatory procedure and further provides for remedies for a defaulter to take steps upon realising h did not comply with the law cannot caught easily within the web of overriding objectives. It is also my view allowing this will create flood gate on non-compliance of mandatory procedural law which in fact protect judiciary vision of timely and accessible justice for all.

In respect to the facts alleged by Mr. Lairumbe that the counsel for appellant was warned on unnecessary preliminary objections and technicalities, despite the fact that the said concern was discussed off record as rightly pointed out by Mr. Lairumbe, I have scanned the record, I am settled the counsel for the plaintiff neither withdrew the said objection nor prayed to abandoned it. Thus, it stayed intact and for that stand it was supposed to be argued and decided, hence this ruling.

In the circumstances, and for the foregoing reasons and authorities above, the objection raised is meritorious. Thus, I find constrained myself to uphold the preliminary objection raised. Consequently, I hereby declare the said Written Statement Defence filed on 6th day of April 2023 was filed out of time, hence it is futile in this matter. Thus, no any Written Statement

Defence filed in this court in the eyes of the law. From the nature of the parties' dispute I order that they shall bear their own costs.

It so ordered.

DATED at **MOSHI** this day of 27th March, 2024.



A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

**A. P. KILIMI
JUDGE**

Court: Ruling delivered today on 27th day of March, 2024 in the presence Mr. Elikunda Kipoko assisted by Ms. Lilian Mushi learned advocates for the plaintiffs. Mr. Leonard Mashabara holding brief of Mr. John Kivuyo learned advocate for the Defendant who is also present in person.

Sgd; **A. P. KILIMI
JUDGE
27/03/2024**