

**IN THE HIGH COURT OF TANZANIA**

**DODOMA SUB-REGISTRY**

**AT DODOMA**

**MISC. LAND APPLICATION NO. 84 OF 2023**

*(Originating from Land Case No. 36/2023 in the High Court of Dodoma at Dodoma)*

**GRACE FELIX TEMU** *(The Administratrix Of The Estate of the Late Of Felix*

*Jonathan Temu)*.....**APPLICANT**

**VERSUS**

**GRACE F. MROSSO** *(Administratrix Of the Estate of the late Felix Tesha/Fidelis*

*Mrosso)*..... **RESPONDENT**

**RULING**

*27<sup>th</sup> May, 2024*

**HASSAN, J.**

Under section 95 of the Civil Procedure Code, Cap 33 R. E 2022 the applicant knocked this court's door praying the court to vacate its *ex parte* order dated the 25<sup>th</sup> day of September, 2023 and allow the applicant to file her Written Statement of Defence out of time in respect of Land Case No. 36 of 2022 pending for hearing in this court.

This application is supported by affidavit sworn by the applicant herself. The respondent contested the application by filling a counter

affidavit sworn by the respondent along with a notice of preliminary objection on points of law, thus;

- 1. That, the application is bad in incompetent for the wrong citation of the law to move this Honorable Court.*
- 2. That, the affidavit supporting the Application is incurable defective therefore unmaintainable.*

When the application came for hearing on the 8<sup>th</sup> day of April, 2024, the applicant was represented by Mr. Fred Kalonga, Learned Counsel whereas the respondent appeared in person unrepresented. Parties herein prayed to proceed by way of written submissions and they complied to the order of preference in filing their written submissions.

Submitting in support of the 1<sup>st</sup> preliminary objection, the respondent argued that, this application was filed to move the court by a wrong citation of the law rendering the application incompetent and incurable before the eyes of the law. That, the applicant moved this court through section 95 of the Civil Procedure Code, Cap 33 R. E 2022, the section which gives inherent power to the High Court to determine matters that lacks specific provision of the law under the Civil Procedure Code. That, according to the applicant's prayers in the Chamber application she is praying the court to set aside the *ex parte* order issued

against her, thus, the applicant ought to have used the specific provision under the Civil Procedure Code as provided under Order IX Rule 9.

The respondent submitted further that, it is an established rule that wrong citation of enabling provision renders the application incompetent. She drew inference to **Zalia Salmin Jaha Vs. Hamad Hamad Matonela**, Miscellaneous Civil Application No. 158 of 2017, (HC) which cited **Edward Bachwa and 3 Others Vs. The Attorney General and Another**, Civil Application No. 128 of 2006 (CAT) and **Major Timothy Magege and Another Vs. Mathew Parceval Chawanga and 5 Others**, Miscellaneous Civil Application No. 11 of 2020 citing the case of **Godfrey Kimbe Vs. Peter Ngonyani**, Civil Appeal No. 41 of 2014.

The respondent argued further that, the incurable mistake of the Applicant to make improper citation of the enabling provision renders the application unmaintainable in court. And that, cannot be cured by invoking the Oxygen Principle as stated in **Valerian Moses Bandungi Vs. Gozbert Cleophace and Baptist Convention of Tanzania**, Miscellaneous Land Application No. 89 of 2021 (HC).

That, the applicant has also improperly used the provision of Section 95 of the Civil Procedure Code as the enabling provision ignoring the rules of procedure and the requirements of the law which also sustain

the application to be incompetent before the court. The respondent stressed her point by citing **Access Bank Tanzania Vs. Ashif Fatehal Ladhani**, Civil Revision No. 10 of 2022 (HC).

Submitting in support of the 2<sup>nd</sup> preliminary objection the respondent argued that, the applicant's affidavit contains substantial defects warranting it unmaintainable before this honorable court. That, the affidavit contains extraneous matters that deems it incompetent to be adopted as part of submissions. That, it contains legal arguments under paragraph 8(b), (c), (d) and (e) respectively as well as paragraph 4. The respondent cited **Peter Erick Mrina Vs. The Republic**, Miscellaneous Criminal Application No. 1 of 2022 (HC) which cited **Uganda Vs. The Commissioner of Prisons, Ex Parte Matovu [1966] EA, 514** and **Mustapha Raphael Vs. East African Gold Mines Ltd**, Civil Application No. 40 of 1988, CAT.

The respondent finalized her submissions by praying the court to dismiss the application with costs and to uphold the *ex parte* judgment against the applicant.

On her part, the applicant contested the preliminary objections by submitting against the first preliminary objection that, the circumstances surrounding the *ex parte* order issued by the court are not cured by the

dictates of Order IX Rule 9 since the said Rule covers the situation where the party never appeared on the date set for hearing and the matter was ordered to proceed *ex parte* against him or her.

That, in their case the matter was ordered to proceed *ex parte* after their WSD was discovered to have been filed one day out of time. As per the provisions of the CPC the only remedy available to the applicant was to knock the door of this court under section 95 of the CPC and not Order IX Rule 9. So, the cases cited by the respondents are irrelevant. And that, since the respondent has not provided for another section or order to curter for the circumstance, their preliminary objection has to be overruled.

As regards to the 2<sup>nd</sup> preliminary objection, the respondent argued that, paragraph 4 of the affidavit cannot be treated as hearsay so long as the deponent has acknowledged or disclosed the source of information as per the law. That, paragraph 8 (b), (c), (d) and (e) are not arguments but factual issues as to what and who ought to be joined in Land Case No. 36 of 2022. Thus, the 2<sup>nd</sup> objection is also devoid of merit.

The applicant prayed the preliminary objections to be overruled with costs and the application be determined on merit.

That is all the parties had to say in support of and against the preliminary objection raised.

In determination of the 1<sup>st</sup> preliminary objection, in his submission, the learned counsel for the respondent has cited the provision of Order IX Rule 9 of the Civil Procedure Code, Cap 33 alleging the same to be the right provision of law ought to have been used by the applicant in moving the court in this application. With due respect to the learned counsel for the respondent, Order IX Rule 9 of the Civil Procedure Code, Cap 33 deals with setting aside an *ex parte* judgment after a suit has been heard *ex parte* and not setting aside an *ex parte* order, as sought by the applicant in this application. Thus, the learned counsel has misdirected himself since the right provision for moving the court for the orders sought by the applicant in setting aside an *ex parte* order is Order VIII Rule 14 Civil Procedure Code, Cap 33.

Now moving to the right provision, that is Order VIII Rule 14, the same provides, thus:-

*"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.*

*(2) Where before ex-parte judgment has been entered pursuant to sub-rule (1) the court may, if the defendant assigns good cause, set aside the order to proceed ex parte, upon such terms as the court may direct as to costs or otherwise.*

*(3) The decree obtained under this rule shall not be executed until after the expiry of the period of sixty days from the date of judgment."*

As provided by the provision above, thus, the applicant ought to have cited the same and not Section 95 of the Civil Procedure Code, Cap. 33 which does not give this court jurisdiction to entertain a matter whose jurisdiction has been provided for under the law.

The impact of citing the wrong provision was deliberated in **Almas Mwinyi Vs National Bank of Commerce and Another Civil Application No. 88 of 1998** (unreported) when the Court had this to say:

*"If a party cites the wrong provision of the law the matter becomes incompetent as the Court will not have been properly moved"*

Also, in the reported case of **Godfrey Kimbe Vs Peter Ngonyani [2017] T.L.R. 157 [CA]** the court held:-

*".....Having made the application for extension of time under the wrong provision of the law, the High Court (Land Division) ought to have struck out that application for being incompetent. It is trite law that wrong citation of the provisions under which an application is made makes that application incompetent and must be struck out."*

Now looking at whether this is a fit case to be cured by principle of Overriding Objective, I am of the firm position that, the parties are bound by the rules and procedures specifically in moving the court. In **Martin Kumalija & 117 Others v. Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 (unreported) the court had the position thus,

*"While this principle is a vehicle for attaining substantive justice, it will not help a party to circumvent the mandatory rules of the Court."*



Hence, moving the court under wrong citation is fatal and cannot be cured by the Overriding Objective Principle, the only remedy is striking out the application. The 1<sup>st</sup> preliminary objection is worthy of disposing the entire application but I will go on to deliberate the 2<sup>nd</sup> preliminary objection for the sake of future insight.

Moving to the 2<sup>nd</sup> preliminary objection that, the applicant's affidavit is incurably defective for containing legal arguments specifically in paragraph 4 and 8 (b), (c), (d) and (e). I see nothing with the paragraph rather than facts deponed by the applicant being the information as supplied to her by her advocate as it can be seen in the verification clause of the disputed affidavit. As regards to paragraph 8 (b), (c), (d) and (e), let me first take liberty to reproduce the same hereunder;

*a) .....*

*b) Failure to join Kondoa Auction Mart whom is alleged to have colluded with the applicant as per paragraph 9 of the Plaint.*

*c) Failure to join Frank Valerian who all the way claimed the property in dispute is his.*

*d) Failure to attach the judgment of the High Court in in Land Case Appeal No. 6 of 2022 which annulled the decision of the Registrar.*

*e) Failure to join the Registrar of titles whom registered the Applicant as the lawful owner of the disputed property and the office which recognizes the owner of the land after expiration of time whereas currently is under the process of renewing ownership for 99 years due to change of system of ownership of land from 33 years lease to 99 and the applicant is paying all rent dues and the last payment was effects on 01.08.2023."*

Now coming to the guidance of the law concerning affidavits. Order XIX Rule 3 of the Civil Procedure Code, Cap 33 provides for guidance concerning what to be deponed in affidavits, thus:-

*"3.-(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:*

*Provided that, the grounds thereof are stated."*

Basing on this legal requirement, in disputed paragraph, the applicant is offending the provisions of Rule 3(1) of Order XIX of the Civil Procedure Code since the said Paragraph 8(b), (c), (d) and (e) contains legal arguments and not factual issues as alleged the applicant in her submissions.

The court has also given guidance in various case laws on the same. In the famous case of **Uganda Vs Commissioner of Prison Exparte Matovu** (supra) the then East African Court of Appeal when faced with a similar situation stated as follows:-

*"The affidavit sworn by Counsel is also defective. It is clearly bad in law. Again, as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only constitute statements of facts and circumstances to which the witness deposes either of his own knowledge or from information to which he believes to be true. Such affidavit must not contain extraneous matter by way of objection or prayer or legal argument. The affidavit by Counsel in this matter contravenes Order 17 rule 3 and should have been struck out."*

In the instant case, paragraph 8(b), (c), (d) and (e) contains arguments, submissions and opinions contrary to the requirement of the law as I have deliberated above.

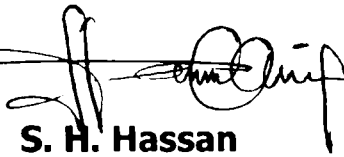
In the upshot, for the foregoing reasons, since the preliminary objection in points of law raised by the respondent are meritorious I

hereby sustain the same and consequentially, I struck out the Application No. 84 of 2023 for wrongly moving the court. No order for the costs.

It is ordered.

**DATED at DODOMA** this 27<sup>th</sup> day of May, 2024.



A handwritten signature in black ink, appearing to read "S. H. Hassan", is written over the seal and extends to the right.

**S. H. Hassan**

**JUDGE**