

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 402 OF 2018

QUALITY CENTRE LTD.....APPLICANT

VERSUS

BANN LIMITED.....RESPONDENT

Date of last Order: 10/8/2018

Date of Ruling: 15/8/2018

R U L I N G

MGONYA, J.

This ruling addresses the Application for an order to vary this Hon. Court's Order issued on 25th June, 2018 in respect of **Land Cases No. 250 of 2017, 249 of 2017, 251 of 2017** and **252 of 2017** before this Hon. Court. The Application has been brought pursuant provisions of **Order XXXVII Rule 5 of the CPC** and supported by an Affidavit sworn by George Nyangusu the Applicant's Advocate.

When the matter came up for hearing, Mr. Nyangusu assisted by Ms. Charli and Ms. Jacob appeared for the Applicant while Mr. Malima David appeared for the Respondent.

On his submission in support of the Application, Mr. Nyangusu has contended that the reason to seek for the instant order is due to the ground that the said order is going to create a greater hardship on the part of the Applicant if it is to operate the way it is.

The learned Counsel proceeded to submit that the reason for closure of the Respondents' premises was due to the continued action by the Respondents of refusing to pay the agreed rent for the premises. Mr. Nyangusu further added that as result of the order, there is a likely hood that the Respondents will continue to refuse to pay also utility services being electricity, water and security costs hence the learned Counsel justified the reasons for the closure of the premises.

Mr. Nyangusu propounded that, the Applicant is not objecting to the order which was issued or challenging it. However, it is the Applicant's concern that the Court modify the said particular order (issued on 25/6/2018) to the effect that the Respondents be ordered to observe their liabilities under the Lease Agreement.

On his part, Mr. Malima responding to the submission of his learned brother, he had the following observations:

First, the learned Counsel was of the view that, pursuant to the Written Laws (Miscellaneous Amendment) Act No. 25 of 2002 the Applicant's Application is incompetent due to the reason that the law prohibits parties to file an Application for review, revision, reverse or otherwise on preliminary or interim/interlocutory order which have no effect of finally determining the suit.

As regards to the reasons for refusing to pay rent, Mr. Malima submitted that this point is an afterthought since the same is not pleaded in the Main Case. The learned Counsel further was of the view that the prayer by his learned brother is not tenable since the parties are yet to file issues and the matter is still pending determination.

In such premises, the Court was invited to dismiss the Application with costs.

I wish to begin with the issue of competence of the Application before I dwell into the burning issues as to whether this Court can vary its order dated 25th June, 2018 in the above stated **Land Cases**.

Of course, I join hands with the argument by Counsel Malima that the Court Order dated 25th June, 2018 was interlocutory order.

When I read contents of Order, the same of course do not decide the rights of parties but only sought to keep the matter in

status quo pending determination of those rights and to enable court to give directions as to how the case is to be conducted so as to enable court ultimately to decide on the rights of the parties.

It follows, therefore that, there is no controversy that the said court order dated 25th June, 2018 is an order which intervenes between **the commencement and finality** of the suit or proceeding to decide a particular matter as stated in the said order, which is not the final decision of the court.

I am aware, and indeed it is well settled principle of the law is this Country that an interlocutory order is not appealable, reviewed, or revised by virtue of Written Laws (Miscellaneous Amendment) Act No. 25 of 2002. The gist of this amendment is to disallow appeals and Application for revision and review on preliminary and interlocutory decision. It follows therefore and am of the view that interlocutory decision cannot be reviewed, revised, or appealed against only if it has determined the rights of the parties to finality.

Now in the instant matter, as stated earlier in this ruling the Applicant has moved this Court for an **"order to vary"** the Court order dated on 25th June, 2018.

The question before me is whether the Court order dated 25th June, 2018 can be varied by virtue of the Written Laws (Miscellaneous Amendment) Act No. 25 of 2002 as propounded by Mr. Malima.

I find hard to follow the line of reasoning adopted by Mr. Malima who purported to argue that the Act No. 25 of 2002 prohibit the institution of the present Application since is one of the interlocutory order.

The Law vide Act No. 25 of 2002 is very clear that an interlocutory order is not appealable, reviewed or revised. The gist of this amendment is to disallow appeal; and Application for revision and review only and not for an Application to vary. The said law has not amended **Order XXXVII Rule 5 of Civil Procedure Code, Cap. 33 [R. E. 2002]** (herein referred as CPC). The Act has amended other laws such as Section 74, 78 and 79 of CPC with exclusion of **Order XXXVII Rule 5.**

Since the instant Application has been brought under the provision of **Order XXXVII Rule 5**, I find the Application before the Court is competent since the provision which has brought the Application has not emanated from Written Laws (Miscellaneous Amendment) Act No. 25 of 2002.

Turning to the burning issue.

Under **Order XXXVII Rule 5 of CPC**, the Court has wide discretion to **vary, discharge, or set aside its** orders where there is some kind of explanation sufficient or material upon which the Court may exercise the discretion given.

Having gone through the averments stated in the Affidavit by Applicant as well the submission or explanation advanced during the hearing, I see no any valid material or explanation sufficient upon which the Court may exercise the discretion to vary its order dated 25th June, 2018. The main reason being that, the Parties are yet to file the **issues for determination** and the question of Landlord and Tenant or Lease Agreement is yet to be determined. It follows therefore the modification of the Court order dated 25th June, 2018 **may preempt the cause of action and reliefs sought in the main case.** I find difficult to vary the said court order to the effect that the Respondent should observe his liability under Lease Agreement. At this stage, this Court has no any material evidence which can justify the Court to make an order that the Respondent to observe his liability under said lease. The question of lease and parties Liabilities is yet to be determined and they can only be determined after parties in the trial adduce evidence in that respect and court make verdict on the same.

Furthermore, upon my perusal of the cause of action and reliefs sought in the main case, purely are based on allegation of non payment of arrears of rent. It follows therefore by ordering the Respondents to observe their liabilities in the Lease Agreement can tantamount to make the suit nugatory since the question of lease, arrears of rent, is yet to be determined and are still waiting for trial and they will be proved by parties upon evidence. The modification of the court order dated 25th June, 2018 as prayed by the Applicant as I have said, will preempt the main suit especially the cause of action and the reliefs sought.

In view of the considerations above, I find that the Applicant has not advanced sufficient cause for court to vary its order issued on 25th June, 2018.

All said and done, this Application is devoid of merits. Consequently, it is hereby **dismissed with an order to costs.**

It is so ordered.




L. E. MGONYA

JUDGE

15/8/2018

COURT: Ruling delivered in the presence of Advocate Flora Jacob for Applicant, Advocate Malima David for Respondent and Ms. Monica, RMA in my chamber today 15th August, 2018.



L. E. MGONYA

JUDGE

15/8/2018