IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 289 OF 2020

MAULID SHABAN.....APPLICANT

VERSUS

TEMEKE MUNICIPAL COUNCIL.....1ST RESPONDENT

FARIDA MOHAMED SAID (as purported Administratix

of the Estate of Jabar Said.....2ND RESPONDENT

RULING

OPIYO, J.

In the Land Case No. 83 of 2018, the applicant herein above, Maulid Shaaban (plaintiff in the said suit), raised a preliminary objection against the Written Statement of Defense and a counter claim of the 2nd defendant/2nd respondent (Farida Mohamed Said), on point of law that,

1. The Written Statement of defense was filed out of time and without leave of the court.

2. The counter claim is time barred

3. The 2nd defendant (2nd respondent) has no *locus standi* to raise a counter claim

4. The counter claim suit is Res judicata

5. The court has no jurisdiction to entertain the 2nd defendant's counter claim.

On the other hand, the two respondents above who are the 1st and 2nd defendants in the said suit also raised two preliminary objections against the applicant (who was the plaintiff in the main suit), that the plaintiff does not have a cause of action against the defendants, since the suit property belongs to the estate of the deceased Jabar Said. The second objection was raised by the 2nd defendant only that, the suit was speculative and frivolous. The parties were ordered to argue their objections against each other by written submissions.

The records show that, only the 2nd defendant /2nd respondent managed to file her written submissions in support of her objections against the plaintiff/applicant hereinabove. As a result of failure to file their written submissions, the court dismissed the objections by the plaintiff/applicant and the 1st defendant/1st respondent for want of prosecution.

Against this background, the applicant has filed this application for review under order XLII Rule 1 (1) (b), challenging the ruling by Demello J.

dismissing his objections against the 2nd respondent for want of prosecution on the following grounds:-

1. That, the court erred in dismissing preliminary objections of the Applicant for want of prosecution when the Applicant had no notice of the hearing schedule by way of written submissions which according to the ruling at page 2 second paragraph was set on 26th September, 2018 in the absence of the parties. Further that reply to Written Statement of Defence to the 1st Defendant was filed on 25/9/2018 and served on 27/9/2018 and that of the 2nd Defendant was filed on 21/9/2018 and served on 25/9/2019 and there was not yet any order for hearing as service of pleadings had not been completed as the last service was on 27/9/2018 and there was yet no report to the court of completion of service. Copy of the ruling is attached.

2. That, on 24/10/2018 there was an order for hearing of Preliminary objections on Misc. Land Appl.No.562 of 2018 and 246 of 2018 on 20/11/2018 made by Hon. Kerefu, J. and a further order that the file for the main suit, that is Land Case No.83 of 2018 which was before Hon. De-Mello, J be called/transferred to the Judge in charge Hon. Kerefu, J. (as she then was) and that the 20th/11/2018 happened to be a public holiday necessitating making appearance on 21/9/2018 before Hon. De-Mello, who had taken over even the Applications. The Hon. Judge erred as she did not inform the parties with regard to the orders she made in their absence and the Applicant wonders how the

2nd Respondent got information and filed submissions which the same did not serve the Applicant.

3. That, the Court erred in purportedly and prematurely making, contrary to practice, an order for hearing of objections on the main suit when those of the miscellaneous applications had not yet been disposed of and surprisingly as from the ruling the date set for ruling is the same. After the ill-fated ruling the fate of the ruling on the objections in Misc. Land Appl.No.562/2018 regarding the applications remains unknown.

4. That, on 21/11/2018 the Hon. Judge made an order for hearing of preliminary objections raised by the Respondent in respect of Misc. Application No.562/2018 and set a schedule for written submissions and a ruling date on 25/4/2019. The court then went into error as the ruling delivered on that date was not on the Misc. Application No.562/2018 for which the Respondents filed no submissions, but on the objections on the main suit which the Applicant had absolutely no knowledge.

5. That, having found out that no submissions had been field in respect of Misc. Application No.562/2018 by the 2nd Respondent, the Applicant advocate wrote a letter on 17/1/2019 informing of its failure to file reply caused by lack of service; however, notwithstanding the said letter, the court went into error for not considering it and apparently never taking any whiff of it as a reminder to make it stay on course.

6. That, there is an error manifest on the face of the record as the Hon. Judge in the impugned ruling and drawn order has invented facts which do not feature in the Plaint of the Applicant. The 12 prayers in the ruling and drawn order purportedly made by the Applicant are not contained in the Plaint in the manner quoted as well as the number of items as the plaint contains only 9 prayers (a – i).

7. That generally there are errors manifest in the record as the Hon. Judge, though in law correctly dismissing the objection, appears to have been reading a different plaint or one that may have been fraudulently tempered with to conform to objection as there are material differences between the facts in the ruling and those in the plaint.

8. That, taking into account the errors in paragraphs 1, 3, 4, 5, 6 and 7 above and the language used in defending the order of hearing in the absence of the parties, but inexplicably availing knowledge to the 2nd Respondent who made submissions, but concealed them, make the error in 2 above more prominent and perplexing thus requiring interference by this court itself.

9. That, as the objections were pure points of law as may be seen upon perusal, an example being the filing of Written Statement of Defence out of time without leave being sought and obtained, the suit being time barred which is discernible from the counterclaim itself, the court

manifestly erred in not even *suo motu* considering them as they could be decided even without any input from the Applicant.

On the above grounds the Applicant prays for the following orders:-

1. That the Court vacates its order of dismissal of preliminary objections for want of prosecution.

2. That the objections raised by the Applicants be restored and heard.

3. That the ruling on the preliminary objections in respect of Miscellaneous Land Application No. 562/2018 for which no submission was filed be composed and delivered and in it the objection be dismissed with costs and application be set for hearing.

4. That Miscellaneous Land Application No.246/2018 be set for hearing.

5. That following 3 above, the preliminary objections be dismissed for want of prosecution.

6. Costs be provided for and

7. Any other relief this Court shall deem fit and just to grant.

Advocate Amini Mohamed Mshana appeared for the applicant while the 1st respondent was represented by Dr. Masumbuko R.M. Lamwai, learned Counsel and the 2nd respondent enjoyed the services of Mr. Christopher Nyinza, Solicitor. The application was argued by a way of written submissions.

Mr. Mshana, in support of the application submitted that, the application has been preferred because the order complained about is not appealable under section 78(b) of Cap 33 RE 2002. He contended that, the review would normally be carried out when and where it is apparent that there is manifest error on the face of the records which resulted in miscarriage of justice, or the decision was obtained by fraud, or the applicant was wrongly deprived the opportunity to be heard or the court acted without authority. He cited the case of **Karim Kiara v the Republic, Crim Appl. No 4/2007, CAT** to fortify his argument.

On the grounds generally, his submission is that the whole proceedings have been mired by mistakes, errors, improprieties, irregularities and illegality quite uncharacteristic of the High Court of Tanzania. He argued that, the reason for contending so emanates from the complicated background to the matter. The background started when the applicant herein filed land case no 83/2018 which was set before Hon. De Mello,J. and Misc. Land Application No 562/2018 which was set before Hon. Kerefu, J. (as she then was). Second respondent/defendant raised preliminary objection based on lack of cause of action against him. That, on 21/9/2018, the applicant/plaintiff therein also

filed a notice of preliminary objection that the written statement of defence by was filed out of time with no leave of the court. On 21/11/2018, the court issued an order for filing written submissions on the second respondent's preliminary objection. However, no written submission was filed by the second respondent by 21/12/2018. This made the applicant write a letter to court on lack of service to him of the second respondent's written submission. That, irrespective of lack of submission by the second respondent, the court stated at page 3 of the ruling that the second respondent had filed submission on his preliminary objection in time. He therefore contends that, in such circumstance, the applicant is left with no option than to allege fraud for incompatibility of court's finding and actual facts he stated above.

His further submission is that, instead of dealing with objections as per its order of 21/11/2018, the Hon. Judge on 26/4/2019 in absence of all parties made an order for arguing the plaintiff's/applicant's preliminary objection by way of written submission. No corresponding order was made to notify parties on the order made in their absence. However, subsequently, the court ruled that the plaintiff's preliminary objections failed for want of prosecution and equally dismissed the same. To him, these facts reveal nothing rather than manifest error, fraud, and wrongful deprivation of right of hearing on part of the applicant worth reviewing before proceeding with any other step regarding the suit at hand. For that, he challenges not only the order being made in parties absence, but also the reason for making such order in the first place, while pleadings were yet to be complete. He

submitted that, the reply to written statement of defence of the first respondent was filed on 2/9/2018 and served on 27th/9/2018 and that for the second defendant was filed on 21/9/2018 and served on 25/9/2018. Thus, per his knowledge there was not yet any order for hearing as service of pleadings were yet to be effected and court notified.

His further submission is that, both applications before Hon. Kerefu, J. as she then was) that is Misc. Land Application No. 562/2018 and Misc. Land Application No. 246 were set for hearing on 20/11/2018 and Hon. Kerefu, J made further order that the file for Main suit, Land case 83/2018 be placed before her as a judge in charge. As a consequence of that order, the parties had to show appearance before Hon. De Mello, J. on 21/11/2018 who had taken over even the applications that were originally before Kerefu, J. That, on that day the Judge never informed the parties of her order for written submission for the respective preliminary objections she made in absence of parties in the main suit. He therefore argued that, the court was in error when it made an order for hearing of objections on the main suit when those of the Misc. Land Applications Nos. 562/2018 and 246/2018 had not yet been disposed of. He thus contended that, condemning the applicant for not reacting on the secret order of filing written submission in regard to his preliminary objection reveals a manifest error, mistake, irregularity and apparent fraud, depriving the applicant right to be heard, the fact that fulfills the ground for review. The therefore prayed for the application to be allowed by granting the orders sought.

In reply, Mr. Christopher nyunza, Solicitor, representing the 1st respondent submitted that, the review was filed contrary to the law which according to the provision of section 78(2) of the Civil Procedure Code, Cap. 33 RE 2002 provides that, no application for review shall lie against or be made in respect of any preliminary or interlocutory decision or order of the court unless such decision or order has the effect of finally determining the suit. From that he argued that, dismissing the preliminary objection raised by the parties in regard to filing written statement of defence, have no effect of finally determining the suit. This is because, since the preliminary objection raised was dismissed the matter has a chance to proceed on merits for final determination.

On the part of the second respondent, in reply, Dr. Masumbuko Lamwai, started by submitting that the memorandum of review is not in compliance with the rules. It is fatally defective as it contravenes provisions of Order XLII R.3 of the Civil Procedure Code read together with order XXXIX R. 1 (2) of the Code. Order XLII r.3 provides that provisions as to the form of preferring appeal shall apply, mutatis mutandis, to applications for review. Thus he submits that, the form of applications for review are mandatorily provided for, that it has to comply with the provisions of O.XXXIX r. (1) and (2) which provides that:-

> *"1(1) Every appeal [review] shall be preferred in the form of a memorandum...and be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded."*

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

He argued that, the provisions cited above are very clear that, memorandum of review like memorandum of appeal is not a submission. Therefore, it should be in a concise points which point out the error on the face of the record or the discovery of new facts as provided for under Order XLII (1). This is not the case as regards the document filed by the applicant in this Application and titled "Memorandum of Review" as it contains arguments or narrations and annextures. He contended that, the so-called memorandum in every paragraph contains arguments referring to paragraphs in rulings, other proceedings that were pending before the court and dates on which there were different occurrences in the proceedings and which are not before the court. To him, these are arguments some of which could have been relevant in supporting grounds for review and not the grounds themselves.

He thus argued that the application is incompetent since it does not comply with the form of bringing applications for review as provided for under O.XLII r. 3 of the Civil Procedure Code. In the premise the whole of the so-called memorandum of review is fatally defective and therefore inadmissible. It is his humble submission that these defects are incurable even under the principle of overriding objective which generally enjoins the court to look at the substance of the complaint before it with a view to ensuring that justice

is done. His argument on is that this principle cannot be used to legalize some illegality (**Mondorosi Village Council and 2 Others v Tanzania Breweries Limited and Four Others, Civil Appeal No.66 of 2017, CA.**) Therefore he prays that, the so the so-called memorandum of review be expunged as containing defects that go to the root of the matter.

Dr. Lamwai also submitted extensively on what he referred to as highly discourteous language in which the Applicant's submissions have been couched. He gave the example of the sentences in the 4th paragraph of page 4 that:-

> *"According to the experience we have with the 2nd Respondent we have no alternative but are constrained to allege fraud'. Otherwise and explanation for this irregular conduct ought to have been given in the counter-affidavits, which is not...we submit that here, the facts manifest error, fraud, wrongful deprivation of right of hearing on the part of the Applicant."*

He contended that, given the use of those harsh words, at the conclusion, one wonders as to who is accused to have committed the error, fraud and wrongful deprivation of the right to be heard if not the court that made the decision forming the subject matter of this application. He argued that, this by necessary implication imputes fraud on the court. To him, this is an extremely serious allegation made by a member of the Bar against the court.

He continued to argue that, even if it can be said that the imputation is on the 2nd Respondent, fraud is such a serious matter especially when it is committed on the court by a party before it. Therefore, mere words from the bar is not sufficient to move the court on this serious criminal allegation. More examples is from the words in last statements in the same paragraph that *"As the above were not enough, what followed thereafter is inexplicable."* He argued that, those words are seriously contemptuous of the court on the part of Learned Counsel. Such language cannot be used against the court. Also, the statement at page 6 the 2nd paragraph that *"...the court ought to have done away with the objections on Miscellaneous Applications before secretly embarking on the main suit,"* which he argues to amount to accusing the court to have secretly proceeded with the suit in conspiracy with the 2nd Respondent on the part of the counsel. Other statements that raised Dr. Lamwai's concern are those in last paragraph of the same page bearing the following wording *'we find it rather disconcerting and perturbing.....the Honourable Judge has invented facts which do not feature in the plaint.....this is a monstrous error.....".* Generally he finds the submission so offensive for containing several innuendos against the court.

Dr. Lamwai also attached Mr. Mshana's submission as containing extraneous matters that are not on record in the suit. For that he argued that, as the issue of the plaint is not under review, the submissions on forgery or otherwise of the plaint is a matter of a full trial and evidence. It cannot be handled at this stage of preliminary objection as it is a settled law that submissions are not evidence. Hence, they should not contain annexures

unless such annexures are authorities to support the submissions. He fortified his argument with the holding in the case of **The Registered Trustees of the Archdiocese of Dar e Salaam v The Chairman Bunju Village Government and four others, Civil Appeal No.147 of 2016** (unreported) at page 7, where the Court of Appeal observed that:-

> "...with respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaboration or explanation on evidence already tendered. They are expected to contain argument on the applicable law. They are not intended to be a substitute for evidence."

On the basis of this authority, he submitted that any reference to annexures in the application is wrong as in fact it is adopted in the submissions as evidence. Thus, in any case, a memorandum of review should not have had annexures except the order complained about and the related ruling. The memorandum of review as seen in 4 paged documents that ends with the prayers had letter annexed to it, the copy of the plaint, the chamber summons and affidavit. These should not have been there and so one could not have made reference to them in the submissions as the applicant did. His prayer is therefore for the entire application being struck out with costs.

I have painstakingly gone through the submission of all counsels and the entire records concerning this application. I have to admit that reading

between the lines of the entire records have not been easy given the impolite language in which the Applicant's submissions have been couched as noted by Dr. Lamwai. It required a lot of fortitude to remain focused reading Mr. Mshana's submission in support of application. Dr. Lamwai's submission on the same above serves well in showing how ill-mannered, Mr. Mshana's submission was, I need not water it down by many words. It suffice to impel a serious caution to Mr. Mshana, learned counsel, to always address court with the dignity expected of its senior officer like him. It is true, one may be outraged by the decision of the court, but still as there is a room of rectifying any 'mistake' by the court, it is of no use expressing one's infuriation in so disrespectful of the court. Highest degree of forbearance is required from both sides.

At the end, it is with the same degree of tolerance, I was able to go through application, submission of all parties and the entire related records in this application. Keenly examining the application, one is easily swayed with brief submission by Mr. Nyunza that there is serious legal issue which cannot be ignored as it determines the matter precisely, but concisely. I am in agreement with him that, the application at hand cannot be entertained by this court as it offends the provisions of section 78 (2) of the Civil Procedure Code (supra). For quick reference, I will reproduce the said provision as follows;-

> *"Notwithstanding the provisions of subsection (1), no application for review shall lie against or be made in respect of any preliminary or*

interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit."

With that provision in mind, what follows is examination whether the decision desired to be reviewed conforms to the above provision. The ruling of Hon. De Mello J of 25/04/2019 on its final orders reads...

"in the foregoing analysis I dismiss the point of preliminary objection and order for the substantive suit be heard on merit"

It is obvious from the final analysis in the ruling which is the basis of the application at hand, the decision reached therein did not finalise the suit. The order is crystal clear that, the substantive suit should proceed to be heard on merits. In short, the ruling and orders of Hon. De mello J in Land Case No. 83 of 2018 are not reviewable based on the above provision as correctly argued by Mr. Nyunza.

Not only that, but also on the same line of order not being reviewable for being interlocutory, I am of the settled view that orders sought, plus imputation of fraud on part of the court are not reviewable by this same court upon which manifest error, fraud is alleged. The orders sought as per memorandum of review filed in court include vacating court's dismissal order for want of prosecution of preliminary objection by the plaintiff in Land Case no. 83/2018 and restoration of the dismissed objections, composing and delivering ruling on the preliminary objections in respect of Misc. Land

Application No. 562/2018 for which no submission was filed by dismissing with costs the objections and order for application to be set for hearing, order for Misc. Land Application No.246/2018 be set for hearing, preliminary objections in No.246/2018 be dismissed for want of prosecution.

The above prayers are so diverse and touches distinct applications/matters before the court. That means this application for review is not only for what transpired in Land case No 83/2018 dismissing applicant's preliminary objections, but also on what should have happened with regard to other applications, Misc. Land Application No.246/2018 and Misc. Land Application No. 562/2018. From the nature of prays above, the application goes to the extent of requiring court in the name of review to order what will amount to Mr. Mshana's predictive verdict in the two applications i.e dismissing the preliminary objections therein for want of prosecution. Obviously, these prayers goes beyond deserving cases for review as they are external to the records, thus, cannot form error on the face of record (records in Land case no 83/2018) desired to be reviewed. It is therefore my considered view that, the entire subject of this application is not amenable to review, leave alone not being reviewable for being an interlocutory in terms of section 78 (2) above. Consequently, the entire application fails for the above reasons. The same is forthwith dismissed with costs.

M. P. OPIYO,
JUDGE
17/4/2020