

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

MISC LAND APPLICATION NO. 52 OF 2020

STANBIC BANK TANZANIA LIMITED.....APPLICANT

VERSUS

RUPIA JONATHAN RUPIA.....RESPONDENT

*(Arising from Land Case No. 1 of 2014 and the order dated 31st August 2016 as per Her
Ladyship Justice Wambura)*

RULING

I. MAIGE, J

1. In this application, I am being called upon to issue a decree instead of a drawn order from the dismissal order of my learned sister Judge Wambura in Civil Application No. 40 of 2016 dated 31/08/2016.
2. The dismissal order from which the decree has to be extracted, has been attached in the affidavit in support of the application and marked **SBT-1**. Express in the order is the fact that, the counter suit was dismissed under order 9 rule 8 of the Civil Procedure Code. In the understanding of the applicant and his counsel which is based on the authority of the Court of Appeal of Tanzania in **Diamond Trust Bank Tanzania Ltd vs. Puma Energy Tanzania Limited, Civil Application No. 40 of 2016**, a dismissal of a suit under the respective provision results into a decree and not a drawn order.

3. In the conduct of this matter, the applicant was represented by Mr. Stanislaus Ishengoma, learned advocate whereas the respondent by Mr. Mwesigwa, learned advocate. I directed the parties to address me on the application by way of written submissions. Mr. Ishengoma timely filed his written submissions. For the respondent, no written submissions were filed. On top of that, the respondent did not file a counter affidavit to oppose the application. I take it that he supports the same.

4. The submissions of Mr. Ishengoma is based on judicial consideration of the statutory definition of the term decree in section 3 of the Civil Procedure Code in two decisions of the Court of Appeal. The first decision is **Barclays Bank Tanzania Limited versus Tanzania Pharmaceutical Industries Limited & Others, Civil Appeal No. 87 of 2015**. In this decision, he submits, a decision dismissing a suit for want of prosecution was considered to be a mere order and not decree because the parties' rights were not determined conclusively. The second one which was decided subsequent to the former is the case of **Diamond Trust Bank Tanzania Ltd vs. Puma Energy Tanzania Limited, Civil Application No. 40 of 2016**. In this decision, he submits, the Court of Appeal took it that a dismissal of a suit be it on merit or preliminary ground, results into a decree. Since the latter is the most recent, the counsel concluded, it ought to have constructively superseded the former.

5. I have taken time to read the two authorities. In the first authority, a decree purporting to have been extracted from an order of the High Court dismissing a suit for the reason that the appellant failed to prosecute the suit when it came up for hearing, was included in the Records of Appeal in terms of rule 96 (1) (h) of the Court of Appeal Rules. Addressing a preliminary objection by the counsel for the respondent, the Court of Appeal ruled out that, as the said order did not finalize the matter in controversy, it was not a decree in terms of section 3 of the CPC. It held therefore that, the decree attached was a wrong document. At page 13 of the decision, the Court of Appeal remarked as follows:-

"We agree with Mr. Msafiri that the High Court's dismissal of the suit by its ruling of 2nd June 2014 for want of prosecution did not amount to or result into a decree but an order"

6. In the second authority, the issue was whether an order made after dismissal of a suit under Order XVIII rule 3 of the CPC amounts to a decree so that an appeal therefrom to the Court of Appeal is automatic in terms of section 5(1) (a) of the Appellate Jurisdiction Act or an order which would be appealable subject to leave of the High Court. The Court of Appeal was saying in this authority that, because the decision thereunder finally determined the matter in controversy, it was a decree which could be appealed against as of right. Therefore, the Court Appeal opined at page 9 of the judgment as hereunder:-

"Going by the principle in the above cases, we think, it is well established that an order of the court made under Order XVII Rule 3 of the CPC is one on the merits of the case and thus appealable as of right under the provisions of section 5(1) (a) of the AJA".

7. In his submissions, the learned counsel understands the principle in the above case to be that, where the word dismissal is used in a decision, be it on merit or preliminaries, the formal expression therein extracted is a decree. I do not read any passage from the decision which supports that view.
8. It is perhaps necessary to unveil that, unlike in the second decision where the specific provision under which the suit was dismissed was disclosed, in the first decision it was not. It was just stated, at page 2 of the ruling that, the suit was dismissed with costs on the ground that "the appellant failed to prosecute its case when it came up for hearing on 14th May 2014". On this, Court the Court of Appeal remarked at page 10 of the second ruling as follows:-

*"On the other hand, Mr. Zaharani holds a diametrically opposite view; that is, the decisions in the two cases are not in conflict. With utmost respect, having dispassionately read Barclays Bank (supra), we are not prepared to swim Mr. Zaharani's current. As rightly submitted by Mr. Kesaria, we are satisfied that the **Barclays Bank** case (supra) is in conflict with **Ally Khalifan Mleh** (supra). We say so because, despite the fact that the Court in **Barclays Bank** case (supra) did not overtly make reference to Order XVII Rule 3 of the CPC, it point blankly stated that an order dismissing a case for want of prosecution did not result into an order. "*

9. In the matter at hand, the specific order under which the suit was dismissed was express in the decision. It was Order 8 Rule 9 of the CPC which provides for dismissal of a suit for non-appearance on the part of the plaintiff. Order XVII Rule 3 of the CPC which was the subject in the two decisions, relates to failure to produce evidence or a witness where time therefor has been granted by the Court. As instructively held by the Court of Appeal in the second decision, such order is final and conclusive such that appeal therefrom lies without a leave of the High Court or Court of Appeal as the case could be.
10. The decision under order 9 rule 8 of the **CPC** as I understand the law, can, under order 9 rule 9(1), be set aside and the suit restored, on application, upon good cause being shown.
11. On that account therefore, I do not agree with the applicant and his counsel that, there is any decision of the Court of Appeal which has construed a decision resulting into a dismissal of a suit under order 9 rule 8 of the CPC as a decree under section 3 of the CPC. In the circumstance, I find no error in extracting a drawn order instead of a decree in the dismissal order in question. The application is therefore dismissed. Since the respondent neither filed a counter affidavit nor written submissions, I will not give an order as to costs. It is so ordered.



A handwritten signature in black ink, appearing to read "I. Maige".

I. Maige

JUDGE

24/04/2020

Date: 24/04/2020

Coram: Hon. D.P. Ngunyale - DR

For the Applicant: Absent

For the Respondent: Absent

RMA: Bukuku

ORDER:

Ruling delivered this 24th day of April, 2020 in the absence of both parties.



D.P. Ngunyale

DEPUTY REGISTRAR

24/04/2020