

THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 535 OF 2021
(Arising from Land Case No. 145 of 2021)

NASSORO KHALIFA GHALIB 1ST PLAINTIFF
WILSON CHACHA 2ND PLAINTIFF

VERSUS

WORLD MAP INTERNATIONAL LTD 1ST DEFENDANT
DAR VILLAGE 2ND DEFENDANT
ZADOCK KOLA 3RD DEFENDANT
KINONDONI MUNICIPAL COUNCIL4TH DEFENDANT
ATTORNEY GENERAL5TH DEFENDANT

RULING

Date of last order: 13.10.2021

Date of Ruling: 21.10.2021

A.Z.MGEYEKWA J

This application is brought under section 95 of the Civil Procedure Code Cap.33 [R.E 2019] and section 2 (3) of the Judicature and Application of

Laws Act, Cap. 358 [R.E 2019], whereas Nassoro Khalifa Gharib and Wilson Chacha are seeking to set aside the *ex parte* order and proceedings in Land Case No. 145 of 2021 which were made on 1st October, 2021. The respondents, while responding to the application, raised preliminary objections on the following points of law:-

1. *That the Application is bad in law for being supported with an affidavit with a fatal defective verification (sic).*
2. *That the Application is bad in law for being supported with an unsigned affidavit (sic).*
3. *That the Application is bad in law for bearing unjustifiable prayers.*
4. *That the Application is bad in law for being speculative of an unpronounced court decision (sic).*

When the matter was placed before me for hearing on 13th October, 2021, the applicants enjoyed the legal service of Mr. Elly Musyangi, learned advocate, whereas the 1st and 2nd Defendants enjoyed the legal service of Mr. John Mallya and Maria Kiwanga, leaned counsels. The 4th and 5th Defendants were represented by Mr. Luoga and Ms. Leonia learned State Attorneys.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the application. That is the practice of the Court founded upon prudence which we could not overlook.

Therefore, before we proceed with hearing the application on merit this court needs to determine the preliminary objections first.

Hearing of the objection pitted Mr. Luoga, learned State Attorney who represented the 4th and 5th respondents. He opted to abandon the first objection. On the second limb of objection that the application is incompetent since the proceedings are governed by Order IX Rule 9 of the Civil Procedure Code Cap.33 [R.E 2019], he asserted that the applicants have not attached the impugned orders and proceeding thus the same is fatal. He valiantly contended that this court has not issued any ruling with regard to Land Case No. 145 of 2021, therefore, it was his view that the instant application is prematurely before this court.

Arguing for the 3rd, 4th, and 5th objections, in his terse submission, Mr. Luoga contended that Dar Village is a business name, not a company hence it has no legal personality to be sued. The learned State Attorney went on to state that the 3rd respondent, Zadock Kola is a Managing Director of ZEC Group Limited, it is a company that owns the disputed land. Therefore, it was his stand that is not proper to sue the 3rd respondent in his own name. Mr. Luoga lamented that the applicants have sued a wrong party and they have no cause of action against the 3rd, 4th and 5th respondents. To fortify his submission he referred this

court to the famous case of **Solomon v Solomon and Company Ltd** [1897] AC 22.

On the strength of the above submission, Mr. Luoga beckoned upon this court to strike out the application with leave to refile.

In reply, Mr. Muyengi came out forcefully and defended the application. He contended that the applicants are seeking this court to set aside the court proceedings conducted on 1st October, 2021 *ex parte* against the applicants' learned counsel. He submitted that the application is made under section 95 of the Civil Procedure Code Cap.33 [R.E 2019] and section 2 (3) of the Judicature and Application of Laws Act, whereas, the applicants are requesting their right to defend the preliminary objections raised by the respondents in the main case. Mr. Musyangi contended that the instant application is not challenging the *ex parte* order or decree. He claimed that the cited Order IX Rule 9 of the Civil Procedure Code Cap.33 [R.E 2019] is misconceived since it does not guide the proceedings instead it is used in setting aside *ex parte* Decree or Order when the defendants did not show appearance.

The learned counsel for the applicant went on to submit that the reason why the applicant have not challenged the same is because the chances to set aside the Decree and order are blocked. For the interest

of justice, he urged this court to give the applicants chance to be heard considering that the respondents will not be prejudiced. Mr. Musyagi further contended that in determining whether the preliminary objection fits the parameter of this court this court be guided by the Court of Appeal of Tanzania authority in the case of **Jacqueline Mengi & Others v Abdiel Mengi**, Civil Application No.332/01/2021, the Court overruled the objections since the same did not meet the threshold of the matter.

On the 3rd objection, Mr. Musyagi contended that this objection is untenable in law and the same is misplaced. In summary he argued that saying that the applicants have sued a wrong party is matter for determination in the main suit otherwise the respondents are preempting the objections raised in the main suit. In an equally laconic fashion, he contended that the raised objection does not fit the threshold stated in the famous case of **Mukisa Biscuits** case. He added that establishing whether the 2nd defendant has the capacity to sue and whether the Company was registered or not requires evidence. He further submitted that the law has not left anything unturned the leave to cure the anomalies is provided under Order I Rule 9 of the Civil Procedure Code Cap.33 [R.E 2019], the court gives the power to strike out the names which are not proper. To support his submission he referred this court to

the case of **Claudia Roman Shikonyi v Estomy A. Baraka & 4 others**, Civil Revision No. 04 of 2012.

As to the 4th Objection, Mr. Musyangi contended that saying the application is filed against a wrong party is misleading the court, since the applicant is seeking leave to be heard. He referred this court to the case of **Claudia** (supra) and argued that if it will be found that the applicants have filed a suit against a wrong party then this court can apply Order I Rule 2 of the Civil Procedure Code Cap.33 [R.E 2019].

With respect to the 5th objection, the learned counsel for the applicants reiterated his submission and stressed that the objection is misconceived, untenable in law, and does not fit the threshold in the case of **Mukisa Biscuits Manufacturing Company Ltd v West End Distributor Ltd** [1969] EA 696. He invited this court to be guided by Order I Rule 9 & 10 of the Civil Procedure Code Cap.33 [R.E 2019]. The learned counsel stated that if the preliminary objections hold water then this court to exercise its power to order rectification by ordering amendment instead of striking out the application. Fortifying his position he referred this court to the case of **Joseph Magombi v TANAPA**, Appeal No.114 of 2016.

On the strength of the above submission, the learned counsel for the applicants beckoned upon this court to dismiss all the objections since they do not fit the threshold of what constitutes a preliminary objection.

Submitting in rejoinder, Mr. Luoga reiterated his contention that this application is not properly before this court. Stressing that the applicants' Advocate in his application is seeking for this court to set aside the court order and proceedings. To support his submission he referred this court to paragraphs 10 and 11 of the applicants' affidavit and added that this is not a fit application for moving this court to set aside an Order and Decree of a ruling which is yet to be determined. He maintained his prayers for this court to dismiss the application with leave to refile.

Having heard the counsel's contending arguments, the Court's unenviable duty is to determine as to *whether the preliminary objections are meritorious*.

On the first objection that the application is incompetent since the proceedings are governed by Order IX Rule 9 of the Civil Procedure Code Cap.33 [R.E 2019]. To tackle this objection, I had first to dig the provisions of law cited by Mr. Musyengi, learned counsel who intends to move this court to determine the instant application. Mr. Musyengi has moved this court to determine the application under section 95 of the

Civil Procedure Code, Cap 33 [R.E. 2019] and section 2 (3) of the Judicature and Application of Laws Act, Cap. 358 [R.E 2019]. For ease of reference, I reproduce section 95 of the Civil Procedure Code, Cap 33 [R.E. 2019] which provides that:-

*“ 95. Nothing in this Code shall be deemed to limit or otherwise affect the **inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.**” [Emphasis added],*

It is worth noting that section 95 of the Civil Procedure Code Cap.33 [R.E 2019] applies only where there is no clear provision in the Civil Procedure Code that inherent jurisdiction can be involved. In other words, in exercising those inherent powers, the court cannot override general principles of the law, for inherent jurisdiction gives only power of procedure and is dependent upon facts of each case.

In the circumstances of the instant case, the learned counsel for the applicant thought that the fall-back position is section 95 of the Civil Procedure Code Cap.33 [R.E 2019]. However, I am not in accord with the submission of Mr. Musyengi, it is my considered view that, the provision of section 95 of the Civil Procedure Code Cap.33 [R.E 2019] is inapplicable in the situation at hand. The circumstance of the matter at

hand is such that, this Court had determined the matter *ex parte* and fixed the date for delivering a ruling. It is my firm view that since there are provisions of the law in place, which give remedies to the person aggrieved by an *ex parte* ruling or order, then section 95 becomes inapplicable in the circumstance at hand.

Moreover, the applicants cited section 2 (3) of the Judicature and Application of Laws Act, Cap. 358 [R.E 2019] as one of the enabling provisions of their application. I have perused the said provision and found that the same is not applicable in the present application as the said provision is related to *maleva* applications.

On the other hand, I am in accord with Mr. Musyengi that Order IX Rule 9 of the Civil Procedure Code, Cap 33 [R.E. 2019] is not a proper provision to move this court to set aside the *ex parte* order or Decree after the delivery of the court ruling. The same is applicable to set aside a dismissal order for nonappearance which is not the case at hand.

Consequently, the first objection raised by the learned State Attorney holds water in the sense that the application is misconceived since this court has not delivered its ruling and the cited provision section 95 of the Civil Procedure Code, Cap 33 [R.E. 2019], and section 2 (3) of Judicature and Application of Laws Act, Cap. 358 [R.E 2019] is not a proper provision to move this court to determine the instant application.

In my considered view, the right procedure was for the applicants to wait for the outcome of the court ruling in Land Case No.145 of 2021, in case aggrieved, they can apply to set aside the *ex parte* ruling.

In the upshot, I find that the first preliminary objection by the learned State Attorney partly is meritorious and holds a sway. Having reached this finding, I deem it superfluous to deal with the remaining objections. I, therefore, proceed to sustain the preliminary objection and dismiss the application without costs.

Order accordingly.

DATED at Dar es Salaam this 21st October, 2021.




A.Z.MGEYEKWA

JUDGE

21.10.2021

Ruling delivered on 21st October, 2021 in the presence of Mr. Uforo Magesho, learned counsel holding brief for Mr. Elly Musyangi, learned counsel for the applicant, Mr. John Mallya, learned counsel for the 1st, 2nd and 3rd respondent and Mr. Ayoub Sanga, learned State Attorney for the 4th and 5th respondents.




A.Z.MGEYEKWA

JUDGE

21.10.2021