

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

MISC. LAND APPLICATION NO. 591 OF 2021

*(Arising from Land Case No. 101 of 2019 delivered by Mkapa, J on 27th
September, 2021)*

**NASORO HANZIRUNI SHAHA (the administrator of the
estate of the late SHAHA MUSSA HANZURUNI.....1ST APPLICANT
JOHA JUMA KILABUKA.....2ND APPLICANT**

VERSUS

**DCB COMMERCIAL BANK PLC.....1ST RESPONDENT
MAJEMBE AUCTION MART.....2ND RESPONDENT
SILVA SYLVESTA BILEGEYA.....3RD RESPONDENT**

Date of Last Order: 01/12/2021

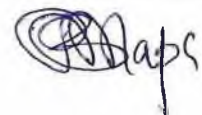
Date of Ruling: 14/12/2021

RULING

MKAPA, J

The applicants herein, have moved this court by way of chamber summons pursuant to Order IX Rule 9 and section 95 of the Civil Procedure Code Cap 33 seeking for an order for restoration of Land Case No. 101 of 2019. The case was dismissed by this Court for want of prosecution on 27th September 2021, as nobody entered appearance on behalf of the plaintiffs.

On 1st of December 2021, when the Application was set up for hearing, Mr. Barnaba Luguwa learned advocate appeared for and represented the plaintiffs, whereas, Mr. Alexander Mzikila and Ms. Doreen Kalugira both



learned advocates represented the 1st and 3rd respondents respectively, while the 2nd respondent did not appear.

Prior to submitting the application on merit, Mr. Luguwa prayed to amend the enabling provision having discovered the same was wrongly cited as Order IX Rule 9 instead of Order IX 6 (1). It was Mr. Luguwa's submission that this occurred due to slip of a pen. Thus he prayed to be allowed to amend the said Order for interest of justice.

In reply Mr. Mzikila submitted that, although he was yet to raise a preliminary objection on the same, the said error was fatal as this Court is not properly moved. He prayed for the Application to be struck out for being incompetent.

Ms. Kalugira counsel for the 3rd respondent joined hands with Mr. Mzikila for the 1st respondent in contesting the application to the effect that, the same should be struck out. She referred this Court to the case of **Mohamed Ally V. The Republic, Criminal Appeal No. 335 of 2014** (Unreported) at page 5 and 6, which emphasized the fact that, the overriding objective principle should not be applied blindly at the expense of rules of procedure.

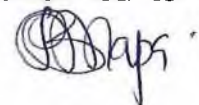
In addition Ms. Kalugira submitted another error under paragraph 4 of the affidavit where the deponent claimed to have been informed by one Zena (a court clerk) on the dismissal of Land Case No. 101 of 2019 that; the verification clause is silent on facts which are true based on applicants' knowledge and those based on their belief. It was Ms. Kalugira's submission that the verification clause implied all information are within the counsel for the applicants' knowledge and the applicants as well which is contrary to Order VI Rule 15 (2) (3) of the Civil



Procedure Code. Thus, the applicants' affidavit is incurably defective hence should be struck out. In support of her contention she relied on the case of **Anatori Peter Rwebangira Vs. The Principal Secretary, Ministry of Defence and National Service and The Attorney General, Civil Application No. 548/04 of 2018 CAT** at page 11, where the Court held that, the law does not allow a blanket or rather a general verification that the facts contained in the entire affidavit are based on what is true according to knowledge, belief and information without specifying the respective paragraphs. She finally prayed for the application to be struck out.

Re-joining the submission Mr. Luguwa submitted that the case of Mohamed Ally (supra) is distinguishable from the present case. That, the principle of overriding objective introduced by the Written Laws (Miscellaneous Amendments) No. 3, Act No. 8 of 2018 requires courts to observe substantive justice by determining the actual matter before it without too much regard on procedural technicalities. He further submitted that, the respondents did not raise point of preliminary objection to that effect, thus the situation would have been different if a preliminary objection would have been raised as the prayer to amend would have been as good as pre-emptying the respondents. Thus he maintained his prayer to be allowed to amend the Order which was occasioned by slip of a pen.

Countering the submission on defective verification clause for non-disclosure of the source of information, it was Mr. Laguwa's argument that, he received information from a Court clerk on the dismissal of Land Case No. 101 of 2019 for want of prosecution. Thereafter, he wrote a letter requesting for the trial Judge Court's Order which is attached to



this application. Thus, his source of information is his own knowledge after being supplied with the Court Order signed by the trial Judge. It was his further argument that, the case of **Anatori Peter Rwebangira** (supra) is distinguishable as each case has to be determined according to its own set of facts. It was Mr. Luguwa's view that, in the spirit of substantive justice a defect in verification clause cannot result into striking out the application. He reiterated his prayer to be allowed to amend the wrong citation.

I have heard learned counsel for the parties and perused the records and the question to be asked is whether this application is incompetent before this Court.

It is on record the fact that, the applicants have filed this application by way of Chamber Summons pursuant to Order IX Rule 9 and Section 95 of the CPC. Mr. Luguwa has prayed to amend the said Order which was erroneously cited instead of Order IX Rule 6 (1). The said Orders are reproduced hereunder for ease of reference.

Order IX Rule 9 reads;

"In any case in which a decree is passed Ex parte, against a defendant, he may apply to the Court by which the decree was passed for an order to set is aside; and if he satisfies the Court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an Order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceedings with the suit;



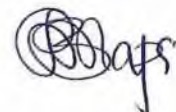
Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also

Order IX Rule 6 (1) provides;

"Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but he may apply for an order to set aside the dismissal aside and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on the hearing, the court shall make and order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.

A Reading from the contents of Order IX Rule 6 (1) above, it is plain clear the fact that, where a suit is dismissed before judgment has been delivered, a party may apply to Court for an order to set aside the dismissal order. In his application Mr Luguwa counsel for the applicant filed the application under Order IX Rule 9 as an enabling provision.

It is well established that, wrong citation of the provision under which the application is made renders the application incompetent. There are numerous decisions to that effect including the decision in **Chama cha Walimu Tanzania V. the Attorney General Civil Application No. 151 of 2008** (Unreported) where the Court of Appeal of Tanzania held;



".....non citation and/or wrong citation of enabling provision renders the proceedings incompetent"

At this juncture, I join hands with the learned counsels Ms. Kalugira and Mr. Mzikila that, the only remedy available is to struck out the application. This suffices to dispose of the whole application and I find no need to dwell on the other objection on defective verification clause.

Given the circumstances of the case and considering the fact that the counsel for the applicant is the one who had discovered the error and prayed for its amendment prior to an objection being raised by the respondents, in my view and for interest of just

ce it would be only fair to struck out the application with leave to file proper application. Accordingly, application is struck, and the applicant is at liberty to file a proper application within seven days from the date of this Ruling.

It is so ordered.



A handwritten signature in blue ink, appearing to read "S. B. Mkapa".

**S. B. MKAPA
JUDGE
14/12/2021**