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

MISC LAND APPLICATION NO. 737 OF 2018

PIUS MTENGWA.....1ST APPLICANT
EZRON MWASAGIE.....2ND APPLICANT
MAGATI K. WIGA.....3RD APPLICANT
SAAD AYOUB.....4TH APPLICANT
ANFRED RWANZO.....5TH APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF
SEVEVENTH DAY ADVENTIST
CHURCH OF TANZANIA.....RESPONDENT

Date of Last Order: 27.09.2021
Date of Ruling: 25.10.2021

RULING

V.L. MAKANI, J

The applicants named above are applying for the court to grant them the following orders:

1. *That this Honourable Court be pleased to set aside ex-parte judgment issued on the 1st March 2019 and order dated 12th December 2019 by this Court (Hon.A. Mohamed, J)*

2. *Costs of this application.*

3. *Any other order (s) and relief(s) this honourable Court may deem fit to grant*

The application is made under Order IX Rule 13(1) and (2), and Section 68(e) of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**)

and it is supported by the affidavit of Daudi Mzeri, Advocate for the applicant.

The application was argued by way of written submissions. Mr. Daudi Mzeri, Advocate drew and filed submissions on behalf of the applicants and Mr. Joseph Kipeche, Advocate drew and filed submissions in reply on behalf of respondent.

Mr. Mzeri adopted the contents of his affidavit and added that the applicants herein were not aware of Land Case No. 352 of 2017 which was finalized in their absence. That the defendants were not notified of the said case. He said that the applicants were not served with any notice to appear and defend the case. That it was against section 23 and Order V Rule 1 of the CPC. He added that even the ten cell leaders and Chairman of Kwembe area where the applicants reside, stated that they were not informed by a court process server of the service or refusal of the applicants to sign the summons purported to be refused by the applicants. That the applicants were not notified of the judgment date. He said that he suspects the court process server had conspired with the respondent and had sworn an affidavit showing that the applicants refused to receive the summons in order

to take advantage of non-appearance. He said that it is against Rule 10 (3) of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules, 2017 which requires process servers to abide with the rules and code of conduct for court process server as set out in the Third Schedule to the rules and other directives as issued by Chief Justice or the Committee when serving court summons.

Counsel further said that the applicants became aware of the case after being served with the summons for execution of the ex-parte decree on 09/06/2019 and they immediately filed an application for stay of execution and for extension of time vide Application No.392/2019 and 393/2020 so as to file the present application. He prayed for the court to grant the applicants with a right to fair hearing under Article 13(6) of the Constitution of the United Republic of Tanzania as amended from time to time. He also relied on the case of **M/S Darsh Industries Limited vs. Mount Meru Millers Limited, Civil Appeal No.144 Of 2015** (unreported). He prayed for the application to be allowed.

In reply, Mr. Kipeche said that the application is in the first-place incompetent for wrong citation of the enabling provision of the law. He said there is no Order IX Rule 13 (1) and (2) in the CPC. He said the ex-parte judgment was entered under Order VIII Rule 14 (1) of the CPC following the applicants' failure to file Written Statement of Defence. That the same can be set aside under Order VIII Rule 15 (1) of the CPC. He said that wrong citation of the enabling provision of the law renders the application incompetent and is liable to be struck out. He relied on the case of **John Marco vs. Seif Joshua Malimbe, Misc. Land Application No.66 Of 2019 (HC-Mwanza)** (unreported). He insisted that the application should be struck out for being incompetent.

On the other hand, Mr. Kipeche said that applicants have not shown good cause for the court to set aside the ex-parte judgment. That the records show that the applicants were served by the court process server summons to file their Written Statement of Defence but refused to receive the summons. They were again served through substituted service in the newspaper **(Annexure HAD -1 and HD-2** to the Counter Affidavit). He insisted that substituted service by publication is effectual as if it has been made on the defendants

personally. That despite the substituted service, the applicants did not file their Written Statement of Defence. He thus prayed for this application to be dismissed with costs.

In rejoinder, Mr. Mzeri reiterated his main submissions and admitted that there was a mistake in citing the enabling provision of law. He said instead of citing the current law he mistakenly cited provisions of the law which were already revised. He prayed for the court to invoke the oxygen principle to rescue the application from being washed away over the omission of the applicants' application which was not intended and did not occasion any failure of justice to the respondent since the defect do not go to the root of the matter.

In determining this application, I shall first consider the concern by Mr. Kipeche that the application is incompetent for being preferred under wrong provision of the law. In his rejoinder Mr. Mzeri for the applicant conceded to the objection and argued the court to apply the overriding objective principle so that the matter can proceed on merit. The application has been preferred under Order IX Rule 13(1) and (2), and Section 68(e) of the CPC. This provision is not only wrongly cited, but it does not exist at all.

It has been held in a number of cases that non-citation or wrong citation of the law renders the application incompetent, and the redress is to strike it out instead of dismissal. This was observed in the cases of **Fabian Buberwa vs. Leonida Daniel, Criminal Appeal No.07 Of 2017 (HC-Bukoba)** and in **Buchambi Misobi vs. Jalali Magashi, Misc. Land Application No.40 Of 2018 (HC-Shinyanga)** (both unreported).

The effect of incompetent application is that the Court lacks jurisdiction to entertain the same. In the case of **Lwitiko Ambindwile vs. Martha A Mtwale, Civil Application No. 17 Of 2020 (HC-Mbeya)** cited with approval the case of **The Director of Public Prosecution vs. ACP Abdallah Zombe & 8 Others, Criminal Appeal No.254 Of 2009** (both unreported) where it was held that:

> *"This Court always make a definite finding on whether or not the matter before it for determination is competently before it. This is simply because the Court and all the Courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceeding".*

In view of the above cited cases the court lacks jurisdiction to try the application for being incompetent. Mr. Mzeri argued the court to invoke the principle of overriding objective. However, the principle of overriding objective cannot be applied in lieu of mandatory provisions of the law. Simply stated, wrong citation of enabling provision cannot be cured by the principle of overriding objective. In the case of **Mondorosi Village Council & Others vs. Tanzania Breweries Ltd & Others, Civil Appeal No. 66 Of 2017 (CAT-Arusha)** (unreported) it was observed that:

> *"Regarding overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case....."*

In view of the above cited case the principle of overriding objective cannot be applied to cure this application as suggested Mr. Mzeri. The court therefore has been improperly moved and thus lacks jurisdiction to entertain this application. In the result, the application is struck out with costs. It is so ordered.

V.L. MAKANI
JUDGE
25/10/2021