

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.410 OF 2022
(Arising from Land Case No. 40 of 2020)**

**THE REGISTERED TRUSTEES OF
CALVARY ASSEMBLIES OF GOD (CAG) APPLICANT**

VERSUS

**TANZANIA STEEL PIPES LIMITED 1ST RESPONDENT
TREASURY REGISTRAR 2ND RESPONDENT
THE ATTORNEY GENERAL3RD RESPONDENT**

RULING

Date of last Order: 08.09.2022

Date of Ruling: 16.09.2022

A.Z.MGEYEKWA, J

This ruling is in respect of an application to set aside the Order of this court dated 1st July, 2022 in Land Case No. 40 of 2020. The application is preferred

under the provisions of Order IX Rule 6 and section 95 of the Civil Procedure Code Cap.33 [R.E 2019]]. The application is supported by an affidavit deponed by Imelda Wilbaidi Maboya, the Senior Pastor of Calvary Assemblies of God, through the affidavit deponed by Imelda Wilbaidi Maboya, another affidavit was sworn by Francis Raphael Nkoka, a Leader of Calvary Assemblies of God and Deogratius Ogunde Ogunde, learned counsel for the applicant.

The respondents has stoutly opposed the application by filing counter-affidavits, the 1st respondent's counter-affidavit was deponed by Mr. Joash Henry Sanga, Human Resource Officer of the 1st respondent, the 2nd and 3rd respondent joint counter affidavit was deponed by Ms. Leonia Bugumba Maneno, learned State Attorney.

The application has hit a snag. On 28th August, 2022 the 1st respondent through Arbogast Mseke, learned Advocate raised a preliminary objection on two points of preliminary objection which read:-

- 1. That the application to set aside Order dated 1st July, 2022 is untenable in law hence cannot be entertained by this Court as the same has already being determined by this Court.*

2. *That the application is bad in law for failure to attach the order sought to be challenged.*

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

When the matter was called for hearing of the preliminary objection on 8th September, 2022, the applicant enjoyed the legal service of Mr. Wilson Ogunde, learned counsel whereas the 1st respondent enlisted the legal service of Mr. Arbogast Mseke, learned counsel, and the 2nd and 3rd respondent had the legal service of Mr. Kauze Kilonzo, learned State Attorney.

The learned counsel for the 1st respondent started his onslaught by submitting on the first limb of objection that the application to set aside the order dated 1st July, 2022 is untenable in law since it is *res judicata*. Mr. Arbogast submitted that on 1st July, 2022, Land Case No. 40 of 2022 was scheduled for hearing before Hon. Mahimbali, J, and Plaintiff was supposed to appear to proceed with the hearing and tender documents. He went on to submit that the learned counsel for the Plaintiff has adduced reasons as to

why the applicant failed to appear before the Court and this Court had an opportunity to hear those reasons and the applicant was allowed to argue on whether or not the Court should adjourn the hearing of the case.

The learned counsel for the 1st respondent continued to submit that upon hearing of both parties, this Court rejected those reasons substantively and proceeded to dismiss the case for want of prosecution. To fortify his submission he referred this court to the impugned Ruling of this Court dated 1st July, /2022. He contended that the applicant through the affidavit deponed by Imelda Wilbaldi Maboya, Francis Raphael Nkoka, Deogratius Ogunde, and in the Chamber Summons are asking this Court to set aside the Order of this Court dated 1st July, 2022.

Mr. Arbogast did not end there, he contended that the reasons to set aside the said Order are the same reasons adduced before Hon. Mahimbali, J on 1st July, 2022. Mr. Arbogast insisted that this Court cannot entertain the same reasons for an adjournment because the said reasons were already considered substantively by this Court and eventually it was dismissed for want of merit. The learned counsel for the 1st respondent spiritedly contended that this Court is *functus officio* because what this Court issued on 1st July, 2022 was a dismissal order under Order IX Rule 1 of the Civil

Procedure Code, Cap.33 and Order VIII Rule 21 (a) of the Civil Procedure Code.

Mr. Arbogast went on to argue that this Order is appealable. Fortifying his position he referred this Court to the number of Court of Appeal of Tanzania authorities which state that any order with effect to finally conclude a matter between the parties is appealable. To buttress his contention, Mr. Arbogast cited the case **Barclays Bank (T) Ltd v Tanzania Pharmaceuticals Industries Ltd & 3 Others**, Civil Application No. 231/15 of 2019. He added that the remedy was to file a revision since the order was appealable. He added that since the said Order is appealable then this Court cannot entertain this application because it has been precluded by the principle of *res judicata* as per section 9 of the Civil Procedure Code, Cap.33 [R.E2019].

Arguing for the second limb of the objection, Mr. Arbogast was brief and focused. He stated that the applicant has not attached the impugned Order of this Court, hence, this Court cannot determine the application

On the strength of the above submission, the learned counsel for the 1st respondent beckoned upon this Court to dismiss the application with costs.

In his reply, the learned counsel for the applicant urged this Court to overrule the preliminary objection for lack of merit.

Submitting on the first limb of objection; Mr. Ogunde contended that this matter is not *re judicata* and this Court is not *functus officio* to determine the present matter. The learned counsel for the applicant contended that not every dismissal order amounts to *res judicata*. He submitted that the Civil Procedure Code provides for remedy where a suit has been dismissed under Order IX Rule 5 of the Civil Procedure Code, Cap.33. He added that if the case is dismissed for want of prosecution, the remedy is to invoke Order IX Rule 6 of the Civil Procedure Code, Cap.33, by moving the Court to set aside the said dismissal Order.

The learned counsel for the applicant further submitted that what was before this Court on 1st July, 2022 was an application for adjournment. He added that after determination of the matter, his Court dismissed the suit for want of prosecution. Therefore, in his view, the said Order is not appealable but the applicant can set it aside.

Mr. Ogunde continued to submit that a plea of *res judicata* cannot be raised because what is pending in this Court is an application to set aside a dismissal Order and there was no any other application to set aside that was

filed before this Court. Mr. Ogunde distinguished the cited case of the **Barclay** (supra). He stated that in **Barclay's** case, parties were ordered to file Witness Statements which amounts to evidence in chief and the appellant failed to file Written Submission. He added that following the Court of Appeal of Tanzania Rules failure to file a Written Submission is as good as failure to adduce evidence. To support his submission, he referred this Court to Order VIII Rule of the Civil Procedure Code, Cap. 33, he stated that the remedy is to invoke Order IX of the Civil Procedure Code, Cap.33. Mr. Ogunde stressed that the parties complied with the Court order by filing the Written Submission.

On the 2nd limb, the learned counsel for the applicant spiritedly stated that this objection is baseless and deserves to be dismissed. Mr. Ogunde contended that there is no any legal requirement for the applicant to attach the impugned Order. He insisted that Order IX Rule 6 of Civil Procedure Code, Cap. 33 does not require the attachment of such an order. He stated that in case it was necessary for the applicant to attach the impugned Order then the same is curable under section 3A and B of Civil Procedure Code. He added that this Court can invoke the oxygen principle since the failure to attach the document does go the roof of the matter.

In conclusion, the learned counsel for the applicant beckoned upon this court to dismiss the preliminary objection with costs.

In his rejoinder, the counsel for the 1st respondent reiterated his submission in chief. Mr. Arbogast insisted that this court cannot reopen what was considered by this Hon. Court, it cannot prove itself wrong.

I have carefully summarized the submissions made by learned counsels for the applicant and respondent and the main question for consideration at this juncture is whether the application is *res judicata* or this court is *functus officio*.

I have perused the records and noted that Hon. Judge Mahimbali, J in his Ruling in Land Case No. 40 of 2022 stated that the matter was scheduled for a hearing, and both parties appeared in court. The Court ordered the matter to be heard by witness statements, the date was fixed for the adoption of the same, admission of exhibits, and cross-examination of the parties' witnesses. On the hearing date, Mr. Ogunde, counsel for the Plaintiff prayed for adjournment on the reasons that the witnesses were sick, the objection was opposed by Mr. Arbogast learned counsel for the 1st Defendant, and Ms. Leonia Maneno, State Attorney for the 2nd and 3rd Defendants. In determining the preliminary objection, this court found that the reasons

adduced by the Plaintiff's counsel were without sufficient legal weight for the court's consideration since there was no any proof that Mr. Francis Raphael Nkoka traveled to Mbeya and he fall sick. This court also declined to accept the Plaintiff's submission that Imelda Maboya was sick since the certificate granting excuse of duty did not state that Imelda is restricted from doing anything. This court was convinced that the reasons given by the Plaintiff's counsel were insufficient to move this Court to adjourn the matter. Hon. Mahimbili, J considered the assertion by learned counsel for the Plaintiff as a calculative move of adjourning the matter unreasonably. Hence Hon. Mahimbili, J dismissed the suit under Order VII Rule 21 (a) of the Civil Procedure Code, Cap.33, which reads that:-

“ Where a party has failed to comply with any of the directions, the court may make the following orders

(a) Dismiss the suit, if the non-complying party is a Plaintiff”

Applying the above provision of the law, it is clear that the reason for dismissing Land Case No. 40 of 2020 was because the Plaintiff failed to comply with the Court's direction and the remedy was to dismiss the suit as the non-complying party was the Plaintiff.

This Court also invoked the provisions of Order IX, Rule 1 of the Civil Procedure Code Cap.33 which requires parties to appear on the day fixed for hearing. Now, the applicant has come before this court trying to move this court under Order IX Rule 6 and section 95 of the Civil Procedure Code Cap.33 to set the order of this court dated 1st July, 2022 in Land Case No. 40 of 2020 for want of prosecution. In my considered view, the cited provision cannot move this court to set aside the dismissal order because this court heard the reasons for the applicant for failure to appear in this Court to proceed with hearing the case.

I have also considered the fact that all parties submitted in length on the issue of failure for the Plaintiff to proceed with the hearing and this court already stated reasons for dismissing the suit. Therefore, I am in accord with Mr. Arbogast that as long as this court considered substantively the reasons of the parties and dismissed the suit.

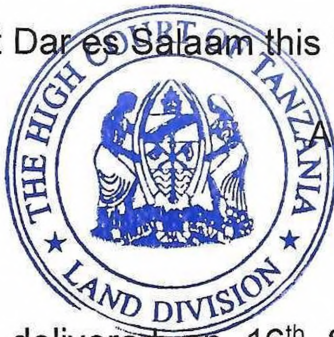
Mr. Ogunde argument that there is no similar pending application before this court, in my opinion, his argument does not justify the appropriateness of the instant application before this Court. This court cannot go against its own decision and decide otherwise. In other words, this Court is *functus officio*.

Consequently, this court cannot determine the application at hand to set aside its Order dated 1st July, 2022 in Land Case No. 40 of 2020.

As all is said and done, I sustain the preliminary objection and proceed to dismiss the Misc. Land Application No. 410 of 2022 with costs.

Order accordingly.

DATED at Dar es Salaam this 16th September, 2022.



A.Z.MGEYEKWA

JUDGE

16.09.2022

Ruling is delivered on 16th September, 2022 via audio teleconference whereas Mr. Arbogast Mseke, learned counsel for the 1st respondent, and Mr. Mathew Fuko, learned State Attorney for the 2nd and 3rd respondents were remotely present.



A.Z.MGEYEKWA

JUDGE

16.09.2022

Right to appeal fully explained.