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

MISC. LAND APPLICATION NO. 378 OF 2022
(Arising from Land Case No. 152 of 2008)

FATHIA BOMANI.....APPLICANT

VERSUS

THE COMMISSIONER FOR LANDS.....1ST RESPONDENT
MOHANED ISNAIL MURUDKER.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT

Date of Last Order: 23.11.2022
Date of Ruling 12.12.2022

RULING

V.L. MAKANI, J

This ruling is in respect of the preliminary objection that has been raised by the 1st and 3rd respondents as follows:

> *"That the application is untenable in law as the same has already been determined by this court and thus the court is functus officio."*

The objection was argued by way of written submissions. The submissions by the 1st and 3rd respondents were drawn and filed by Mr. Edwin Joshua Webiro, State Attorney and the applicant's submission in reply were drawn and filed by Mr. Roman Selasini Lamwai, Advocate.

Submitting on the objection, Mr. Webiro gave a brief background oF the origin of the application herein. He said the applicant herein instituted Land Case No. 152 of 2008 against the respondents claiming inter alia declaration as a lawful owner of the suit land. The suit was scheduled for hearing on 05/07/2022 whereby the applicant appeared in person. When she was called upon by the court to adduce evidence in support of her case, she prayed for an adjournment on the ground that her advocate was appearing before the Court of Appeal. To prove this assertion the applicant produced a court summons that revealed that the summons was for hearing which took place on 27/04/2022 and not on the date of hearing, that is, on 05/07/2022. He said with this contradiction the court refused to accede to the prayer for adjournment and went further to say that since the applicant was in court and she has failed to proceed with hearing of the case then it is considered as failure to prosecute her case. The court then dismissed the suit for want of prosecution basically because the applicant was unable to produce evidence to prove her case. After the dismissal of the suit the applicant then filed this application praying for the dismissal order to be set aside.

Mr. Webiro submitted that the objection is that this court is *functus officio*. He said it is a well settled principle of the law that whenever a suit is called for hearing and the defendant appears, but the plaintiff does not appear the court may dismiss the suit for non-appearance, and when this happens, the plaintiff may apply to set aside the dismissal giving reasons indicating what prevented him from entering appearance. However, where the plaintiff appears when the matter is fixed for hearing and he fails to proceed with hearing of the case, then the subsequent dismissal is for want of prosecution, that is, failure to establish the case. Mr. Webiro observed that an order of such nature, that is, dismissal for failing to establish the case, is appealable and cannot be set aside by the same court which issued it because it is considered to have been conclusively determined. The court therefore becomes *functus officio* as regards to the matter. He said the matter becomes *res judicata*. Mr. Webiro relied on the book of**Mulla Code of Civil Procedure 19th Edition Vol.2** at page 2036 where the book explained Order IX Rule 8 and 9 of the Indian Civil Procedure Code which is in *pari materia* with Order IX Rule 5 and 6 of our Civil Procedure Code CAP 33 RE 2019 (the **CPC).** He proceeded to state that since the applicant was present in court but was unable to prosecute her case, she cannot avail herself to a remedy available

to a person whose suit is dismissed for non- appearance. He said since the suit was dismissed for want of prosecution, the matter is therefore res judicata and the court is functus officio. He said the available remedy for the applicant is an appeal to the Court of Appeal. He said since the order of dismissal was by this court then the same court cannot fault its own order unless the dismissal was for non-appearance which is not the case. He relied on the cases of **Scholastica Benedict vs. Martin Benedict [1989] TLR 2** and **Barclays Bank (T) Limited vs. Tanzania Pharmaceutical Industries Limited & Others, Civil Application No. 231/16 of 2019 (CAT-DSM)** (unreported) which quoted the case of **Salem Ahmed Hassan Zaid vs. Fued Hussein Hemed [1960] 1 EA 93.** He concluded that the dismissal of the suit was for want of prosecution founded on evidence due to inability of the applicant to establish her case. He prayed for the application to be dismissed with costs.

In reply Mr. Lamwai said that the order made by honourable Judge was derived from the proviso of Order VIII Rule 21 (a) of the CPC read together with Order IX Rule 1 and 5 of the CPC. He said Order VIII Rule 21 is applicable in making a decision resulting from failure

on the part of the plaintiff to comply with any of the directions of the court when the said directions are made are made at a time or proceedings during the First Pre-Trial Settlement and Scheduling Conference. He said on the date when the suit was dismissed the First Pre-Trial Settlement and Scheduling Conference was already held and the matter was at the hearing stage. He said it was therefore not proper for the court to move itself or derive its decision from the said provision of the law.

On the other hand, Mr. Lamwai said, Order IX Rule 1 and 5 of the CPC that was used by the honourable Judge is in respect of consequences as to when the defendant only appears, and the plaintiff does not appear when the suit is called for hearing. He said this is what happened that the advocate for the plaintiff failed to appear and when an adjournment was applied for the court refused to accept the reasons brought before it to the extent of accusing the plaintiff who was a witness and ready to testify upon the arrival of his advocate who was in the Court of Appeal. He said the dismissal order was not in accordance with the proviso of Order XVII Rule 3 of the CPC but the decision was based and derived from Order IX Rule 1 and 5 of the CPC of which remedy available is in the first instance

is to set aside the dismissal order. Mr. Lamwai said the use of the phrase *"failure to prosecute"* does not establish the fact that the order was delivered in the ambit of Order XVII Rule 3 of the CPC. He pointed out that the said phrase *"failure to prosecute"* was misplaced by the honourable trial Judge with the intention to condemn the plaintiff as pleaded in the affidavit by the applicant in support of this application. He said it is not correct and will cause injustice to conclude that the said order was based on the proviso of Order XVII Rule 3 of the CPC as the court inferred that non-appearance of the advocate results to the plaintiff's failure to prosecute her case. He said it would have been different if the proviso of Order XVII Rule 3 of the CPC disclosed or even mentioned by the court when deriving to its decision or if the mention of the phrase *"failure to prosecute"* was used without mentioning the proviso of Order IX Rule 1 and 5 of the CPC.

Mr. Lamwai said according to **Mulla The Code of Civil Procedue 16th Edition** at page 2300, for Order XVII Rule 3 of the CPC to be applicable it was essential that the court could proceed only when the parties were present, meaning all the parties to the suit. He said Rule 3 is directed to a case where the hearing is adjourned at the

instance of a a party from one party or the other for the purposes specified in the rule and if the party fails to perform the specified act for which the adjournment was granted within the tin allowed by the court it is when the court proceeds to decide the suit forthwith. He said the adjournment therefore has to come from the party who now failed to perform the said act that is when the proviso to Order XVII Rule 3 comes into play. He said the order of the court was in respect of Order IX Rule 1 of the CPC because the advocate who was representing the plaintiff was not present that is why there is nowhere in that can be read that the court was moved by Ordr XVII Rule 3 of the CPC. He said the objection raised spurious and prayed that it should be overruled with costs.

In rejoinder, Mr. Webiro submitted that to a larger extent the submissions raised to support the objection remain uncontroverted because the use of the phrase *"failure to prosecute"* is not misplaced as contended by Counsel because when the suit came for hearing the applicant (then plaintiff) appeared in court and she prayed for an adjournment of the hearing of the suit and the prayer was refused. Upon failure by the applicant to prove her case it was dismissed for want of prosecution. He said the argument that the order in question

was not made under XVII Rule 3 of the CPC but was under Order VIII Rule 21 and Order IX Rule 5 of the CPC and cannot be treated as a final order subject to an appeal is misconceived. This was also stated by the Court of Appeal in the case of **Barclays Bank (T) Limited** (supra) when dismissing the suit for want of prosecution due to failure of the plaintiff to prove the case. He said in that case there was provision cited but the Court of Appeal concluded that even if no provision was cited but since the dismissal was for want of prosecution it was a final order. He thus said the citing of Order 1 Rule 5(1) of the CPC would not change the nature and effect of the order from being an order for dismissal for want of prosecution to an order of non-appearance. Since the applicant was in court and she failed to prosecute her case then the order is for want of prosecution and not otherwise. He said the order can only be reversed by the Court of Appeal and not this court as it is *functus officio.* He said Counsel was misleading the court for arguing that the order is ambiguous. He called upon for the application to be dismissed as the court is *functus officio.*

I have gone through the rival submissions by the learned State Attorney and Advocate for the parties respectively. The main issue for consideration is whether this court is *functus officio.*

Now, when does the court become functus officio? In the case of **Cipex Company Limited vs Tanzania Investment Bank (TIB), Civil Appeal No.137 of 2018 (HC-DSM)** (unreported), the court quoted the case of **Malik Hassan Suleiman vs SMZ [2005] TLR 236** where it was stated:

> *"A court becomes functus officio when it disposes a case by a verdict of guilty or by passing a sentence or making orders finally disposing of the case"*

Further, the court cited the case of **Kamundi vs. R (1973) EA 540** where it was stated:

> *"A further question arises, when does the magistrate's court become functus officio and we agree with the reasoning in the Manchester City Recorder case that this case only be when the court disposes of a case by verdict of not guilty or of by-passing sentence or making some orders finally disposing of the case"*

In this present application it is not in dispute that when Land Case No. 252 of 2008 was called for hearing the plaintiff was present and her prayer for adjournment was rejected because she said her Advocate was in the Court of Appeal but the summons presented as

proof showed that it was for 27/04/2022 and no 05/07/2022 the date set for hearing when both parties including the said Advocate were present. Since she did not want to proceed with the hearing of the case herself, the court dismissed the suit for want of prosecution. It is apparent therefore that the suit was finally disposed.

Now, what is the remedy when the suit is dismissed in the circumstances stated hereinabove? While Mr. Webiro states that the remedy is an appeal as this court is *functus officio*, Mr. Lamwai states that setting aside the dismissal order is the proper procedure hence this application.

Considering the arguments presented herein, I am inclined to agree with the Learned State Attorney that this court is *functus officio*. This is because the order of the court in Land Case No. 252 of 2008 was final and conclusive as all the parties were present but unfortunately the plaintiff could not prosecute her case. This court cannot turn around and set aside its own decision conclusively determined. As correctly stated by Mr. Webiro, an order can be set aside if the defendant appears, and the plaintiff fails to appear, because in such a scenario, the plaintiff will have an opportunity, by way of an

application, to convince the court why he/she or their advocate failed to appear in court on the date set for hearing. The court may, if satisfied with the reasons advanced, set aside the dismissal order. However, in the present instance, the applicant appeared, but she failed to proceed with hearing, that is, she was unable to produce evidence to prove her case to the standards required by the law. If the court would sit and start to analyse the reasons why the applicant could not prosecute the case it would be questioning the decision of the same court which is not proper. In other words, determining this application as suggested by the applicant would be re-opening the matter and/or sitting as an appellate court in respect of the decision already given by this very same court. The only court which can now question the decision of this court in Land Case No. 252 of 2008 and intervene accordingly, is the Court of Appeal. This court is therefore *functus officio* as the matter in Land Case No. 252 of 2008 finally disposed (see the case of **Scholastica Benedict** (supra). The arguments and reasons setforth in the submissions by Mr. Lamwai are good grounds for appeal which I would not dwell to address them.

In view of the above, I find merit in the objection raised and it is sustained. The application is therefore dismissed with costs for being untenable as the court is *functus officio*.

It is so ordered.

V.L. MAKANI
JUDGE
12/12/2022