

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

MISC. LAND APPLICATION NO. 295 OF 2022

(Arising from Misc. Land Application No. 205 Of 2022)

APPLE COMPANY LIMITED PLAINTIFF

VERSUS

**DIRECTOR, KIBAHA TOWN COUNCIL.....1ST DEFENDANT
ATTORNEY GENERAL.....2ND DEFENDANT**

Date of Last Order: 10.06.2022
Date of Ruling: 13.06.2022

RULING

V.L. MAKANI, J

This is an application for review which is made under Order XLII Rule 1(1)(a) and Sections 78(1)(a) and 95 of the Civil Procedure Code CAP 33 RE 2019. The grounds of the of the application were two namely:

- 1. The court erred in fact and in law in dismissing the Misc. Land Application No. 205 of 2022 while there was an error in preparation of the summons whereas the date of first hearing on the summons was wrongly written thus misleading applicant to make an appearance in court.*
- 2. That the applicant found out about the error on 3^d June 2022 when he was submitting a letter requesting Court Registrar to change the date of first hearing of Misc. Land Application No. 205 of 2022 so as to bring it to closer fate so the atter can be heard as soon as possible, since the date set earlier of 16th June, 2022 was too far with regarding the urgency of the matter.*

The applicant prayed for the court to vacate its dismissal order or any other relief this court may deem just and fit to grant.

At the hearing of the application, Mr. Singa, Advocate represented the applicant, while Mr. Mwinyi, Principal State Attorney from Kibaha District Council, represented the 1st respondent. The matter proceeded in the absence of the Attorney General though duly served.

Mr. Singa, submitted that the application was dismissed for want of prosecution. He said they have filed an application for review because there is an error on the summons to the parties. The summons was dated **16/06/2022** instead of **16/05/2022** which was the date of the first hearing of Misc. Land Application No. 205 of 2022. He said the error is by the court itself and they were not aware of the error until when they wrote a letter to the court on 03/06/2022 to pray for the matter to be heard on an earlier date. He said as a matter of law, the error on the court records and the principles of natural justice, ties the hands of the court save for review. He thus prayed for the

court to vacate its order for dismissal and/or any other relief(s) it may deem just and fit to grant.

On his part, Mr. Mwinyi, objected to the application stating that the court has no jurisdiction to vacate its own order of 31/05/2022. He said if the matter were for mention and was mistakenly heard then it would have been an error apparent on the record. He said the court is *functus officio*; and he cited the case of **Scholastica Benedict vs. Martin Benedict [1993] TLR 1**, that once a court has decided on a matter it cannot overrule its decision. He said he did not see any error on the face of the record, and the remedy by the applicant ought to be an appeal and not application for review. He said the application is not a proper challenge to the decision of the court and the provisions cited are not proper either. He prayed for the application to be dismissed with costs.

In rejoinder Mr. Singa reiterated his main submissions and emphasized that if they had an idea that the matter was coming on 15/05/2022 they would not have written a letter to request for an earlier date. He said summons is part of the proceedings of the court and whenever there is an error on the summons it forms part of the

record. He said according to Order XLII Rule 1 of the CPC record has not been specified so summons is also a record. He said he could not submit on the case cited because it was not shared. He said functus officio may be true but there are exceptions and one of them is application for review. And he said he is asking the court to review its order for dismissal. He reiterated the prayers in the main submissions.

I have listened to the learned State Attorney and Advocate respectively. The main issue for consideration is whether this application is meritorious.

Order XLII Rule 1(1) of the CPC provides:

"Any person considering himself aggrieved:

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."

Consequent to the provision above, the principles underlying applications for review were clearly enunciated in the case of **Chandrakant Joshubhai Patel vs. Republic, Criminal Application No. 8 of 2002 (CAT- Dar es Salaam)** (unreported) where it was stated:

*"An error which will ground a review whether it be one of fact or one of law, will be an error over which there should be no dispute and which results in a judgment which ought to be correct as a matter of justice. As stated in **Attilio vs. Mbowe [1970] HCD No. 3:***

"The principle underlying a review is that the court would not have acted as it had if all the circumstances has been known."

In the same case of **Chandrakant Joshubhai Patel** (supra) an error apparent on the record was clarified when the court quoted Mulla 14th edition page 2335-36 and stated:

"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on the points on which there may conceivably be two opinions"

In the present case it is apparent that there was an error on the summons issued which reflect hearing on **16/06/2022** instead of the order of the court of hearing was on **16/05/2022**. Mr. Mwinyi

admitted that they received summons reflecting that hearing was on **16/06/2022** and that is why on the date set by the court on **16/05/2022** and subsequent dates on **20/05/2022** and **31/05/2022** none of the parties appeared. This confirms that the parties were all aware and were set for hearing on **16/06/2022** and Mr. Mwinyi for the 1st respondent duly consented that hearing date on the summons was **16/06/2022**. The discovery of the dismissal of the matter came to the knowledge of the applicant on **03/06/2022** when he filed a letter to call upon the court to reverse its order so that the matter is heard earlier than **16/06/2022**. In that regard, I hold, that there was an error on the record (summons), which was not in the knowledge of the parties and the court and this error was discovered by the applicant.

Mr. Mwinyi said that the summons is not part of the record of the court and the court is *functus officio*. But with due respect, this assertion is not correct because a summons is a court document which is relied upon subsequently, it is part of the record. And according to Order XLII of the CPC, the court is not *functus officio* because if the court had on its part noted this error, then its decision would have been

different, and hearing would have proceeded according to the date reflected in the summons.

Following the case of **Chandrakant Joshubhai Patel** (supra), the error apparent on record is quite obvious as the court has not made any efforts or long drawn process in reasoning that the Registry Clerk, in the course of her duties, mistakenly wrote in the summons **16/06/2022** as the hearing date instead of **16/05/2022**.

In view of the above, the application for review is granted. The order of this court of 31/05/2022 is hereby vacated and Misc. Land Application No. 205 of 2022 is restored. The court shall proceed to hear Misc. Application No.205 of 2022 on a date to be set by the Deputy Registrar after all the procedures to re-register the application is completed in terms of Order XLII Rule 8 of the CPC. Costs to follow events.

It is so ordered.




V.L. MAKANI
JUDGE
13/06/2022