

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

MISC LAND APPLICATION NO. 589 OF 2022

*(Originating from Ex Parte Judgment Delivered in Land Case No. 132 of 2011
of the High Court Land Division)*

ALPHONCE KIHWELE APPLICANT

VERSUS

**IRENE LAZARO MOLLEL (As administratrix of the estate
of the late PRUCHERIA MEITORIS MOLLEL, Suing by
Attorney LAZARO LOKAJI MOLLEL) RESPONDENT**

Date of last Hearing: 25/11/2022

Date of Ruling: 21/02/2023

RULING

I. ARUFANI, J

The applicant filed in this court the application at hand urging the court to set aside ex parte judgment delivered by the court in Land Case No. 132 of 2013. When the application came for hearing on 25th November, 2022, Mr. Boniface Erasto Mello, learned advocate represented the applicant and prayed to amend the chamber summons under section 95 of the Civil Procedure Code, Cap 33 R.E 2019. He told the court there is a defect in the application in relation to the date of the impugned ex parte judgment and the decree corrected by the court. He stated the discovered defect is a human error or typographical error which does not render the application incurably defective.

He supported his application with the cases of **National Bank of Commerce Ltd V. Millo Construction Company Limited & Two Others**, Misc. Com. Case No. 102 of 2015, HC Com. Division at DSM and **Ziada William Kamanga V. Amanda Brighton Kamanga & Another**, Misc. Civil Appl. No. 390 of 2021 HC at DSM (Both unreported) where the court allowed chamber summons to be amended. He prayed the court to allow them to amend the chamber summons so that he can insert the correct date of correcting the decree in the chamber summons as rectified by Hon. Mgeyekwa, J

In his reply Mr. Ally Hamza who represented the respondent in the the matter resisted the prayer made by the counsel for the applicant and stated the application is defective for not mentioning the correct date of the judgment and the application is not accompanied with the order correcting the decree issued by Hon. Mgeyekwa, J. He stated the parties are bound by their pleadings and referred the court to the case of **Peter Karant & 48 Others V. The Attorney General & 3 Others**, Civil Appeal No. 3 of 1988, CAT at Arusha (unreported). He stated the judgment before the court shows it was signed on 30th November, 2013 and the decree attached in the application shows the matter was coming for judgment on 30th October, 2013. He argued there is no order of the

court correcting the date of the judgment to read it was delivered on the date indicated in the corrected decree.

He contended that, the submission that the date in the judgment and decree was corrected is a hearsay as there is no order attached to the application to show the judgment was corrected. He referred the court to the case of **Puma Energy Tanzania Limited V. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of 2018, CAT at DSM (unreported) where it was stated a judgment from which a decree is extracted being defective is worse than the decree itself. He stated that, mentioning a non-existing date or failure to attach the order correcting the judgment in the application is fatal and it renders the application defective.

He referred the court to the case of **Hammers Incorporation Co. Ltd V. The Board of Trustees of Cashew nuts Industry Development Trust Fund**, Civil Application No. 213 of 2014, CAT at DSM (unreported) where it was stated that, as the order correcting the decree was not attached in the application the application is supposed to be struck out. He argued further that, as the prayer to amend the chamber summons was made after the court raised an objection that the application is defective, the prayer cannot be granted. He supported his argument with the case of **Julius K. Nkonya V. William Michael Kudoja**, Civil Application No. 12/01 of 2018 where it was stated a prayer

for amendment of pleadings cannot be made where preliminary objection has been raised.

He submitted that the remedy available is for the court to strike out the application so that the applicant can file proper application in the court if he wishes to do so. He stated the case of **National Bank of Commerce Limited** (supra) is totally distinguishable from the application at hand as the variation was on the chamber summons and in the affidavit. He argued that, the case of **Ziada William Kamanga** (supra) is not applicable in the case at hand because the defect in that case was on the provision of the law cited and not on the date of the delivery of judgment indicated in the decree. He submitted that if the court will rely on the copy of the ex parte judgment attached in the application it will base its decision on the defective judgment and prayed the application be struck out with costs.

In his rejoinder the counsel for the applicant told the court the counsel for the respondent has submitted on the points of preliminary objection which he has already withdrawn from the court. He argued that is not proper and prayed the court to disregard his submission. He stated the counsel for the respondent has not cited any law showing the order correcting the decree is required to be attached in the application. He submitted that, as the judgment and the order correcting the decree are

attached in the application, then the application is properly before the court.

He distinguished all the cases cited by the counsel for the respondent and stated are not applicable in the present application. He submitted that the counsel for the respondent has not stated how his client will be prejudiced if the applicant will be allowed to amend his chamber summons. He insisted that the cases he has cited in his submission are relevant and are supporting his prayer. Finally, he prayed the court to overrule the objection raised by the counsel for the respondent and prayed to be allowed to amend the application.

After considering the rival submissions from the counsel for the parties the court has found the issue to determine in this application is simply whether the applicant can be allowed to amend his chamber summons which is seeking for an order of setting aside the ex parte judgment delivered by the court in Land Case No. 132 of 2011. The court has found the defect stated by the counsel for the applicant is in their chamber summons is the defect appearing on the date of the impugned judgment which he stated was corrected by Hon. Mgeyekwa, J.

The court has found that, although the present application shows the ex parte judgment the applicant is seeking for an order to set it aside was signed on 30th November, 2013 but the decree issued and corrected

by the court shows the judgment was delivered on 30th October, 2013 which is a different date from the date of signing the ex parte judgment. The court has found that, although the counsel for the applicant stated the date in the said ex parte judgment and decree was corrected by the order of the court issued by Hon. Mgeyekwa, J but there is no order showing the date in the ex parte judgment has ever been corrected to tally with the date indicated in the decree corrected by the court produced to the court.

To the contrary the court has found the copy of the ex parte judgment attached to the application shows the exparte judgment was signed on 30th November, 2013 and the corrected decree attached to the application shows the judgment was delivered on 30th October, 2013. The court has found the law as provided under Order XX Rule 3 of the Civil Procedure Code states clearly that the judgment is required to be dated and signed by the presiding judge or magistrate as of the date on which it was pronounced in open court and Rule 7 of the same provision of the law states the decree is required to bear the date of the day on which the judgment was pronounced.

That being the position of the law the court has found that, as the copy of the ex parte judgment attached to the application at hand shows it was signed on 30th November, 2013 and the corrected decree attached

to the chamber summons shows the ex parte judgment was delivered on 30th October, 2013 there is no amendment which the applicant can effect in the application at hand to rectify the defect of the dates appearing in the copies of ex parte judgment and decree attached to the application. To the view of the court the applicant is required to find out the copies of the judgment and decree bearing the correct dates before seeking to amend the application which cannot be maintained without having the copies of the judgment and decree which are properly dated.

In the premises and without delving into other arguments made to the court by the counsel for the parties and the authorities they have cited to the court, which to the view of this court will not change the above finding, the court has found the prayer of the applicant to amend the application cannot be granted as the defect stated is in the application is not a defect which can be rectified by amending the application. Consequently, the prayer of the counsel for the applicant is not granted and in lieu thereof the application is struck out for being incurably defective. It is so ordered.

Dated at Dar es Salaam this 21st day of February, 2023



I. Arufani

JUDGE

21/02/2023

Court:

Ruling delivered today 21st day of February, 2023 in the presence of Mr. Hubert Mligo, advocate for the respondent and in the absence of the applicant and his counsel. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
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JUDGE

21/02/2023