

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 93 OF 2023**

DEOGRATIUS RUTABANA..... PLAINTIFF

VERSUS

MWANGA HAKIKA MICROFINANCE BANK.....1ST DEFENDANT

THE COMMISSIONER FOR LAND.....2ND DEFENDANT

THE REGISTRAR OF TITLES.....3RD DEFENDANT

THE HONORABLE ATTORNEY GENERAL.....4TH DEFENDANT

NUTMEG AUCTIONEERS & MANAGERS CO. LTD.....5TH DEFENDANT

JOHNSON ZUBER ZIMBO.....6TH DEFENDANT

RULING

Date of last Order: 12/7/2023

Date of Ruling: 03/8/2023

A. MSAFIRI, J.

This is a land case whereby the plaintiff is seeking for Court declaration that the sale of his property built on Plot No. 402 Block "E" Mbezi Beach within Dar es Salaam City by way of public auction which was purported to take place on 04/4/2018 is illegal, null and void.

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After the completion of pleadings, the matter went for mediation and after the parties failed to settle the matter by mediation, the case was remitted before me, the trial Judge for commencement of trial.

On 12/7/2023, the counsel for the plaintiff, Mr. Martin Frank prayed to address this Court on two issues. The prayer was granted. He addressed the Court on several issues. The first issue was on mediation proceedings. He submitted that, after the pleadings were completed, this suit was sent to Mediation Centre where parties were supposed to appear before the Mediator for mediation proceedings.

Mr. Frank submitted further that during the mediation, only the plaintiff and the 6th defendant attended the mediation proceedings to the end. That, the rest of the defendants i.e. the 1st- 5th defendants never appeared before the Mediator and no any reason was given by the said defendants for their non-attendance. In other words, no any notice was issued to the Mediator on the 1st – 5th defendants' absence.

He said that, in the end, the mediation was marked failed in presence of the plaintiff and 6th defendant only. That the 1st – 5th defendants did not attend the mediation despite the fact that they knew that the case was

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scheduled for mediation. He prayed for the Court to strike out the 1st -5th defendants' defence under Order VIII C Rule 29 (a) of the Civil Procedure Code Cap. 33 R.E 2019, (the CPC).

The second issue by Mr. Frank was that the 1st defendant has never served the plaintiff with their amended written statement of defence (WSD) until when the mediation was declared to have failed. That, the 1st defendant served the plaintiff on 06/6/2023 when all parties appeared in Court for final Pre Trial Conference (PTC). That the 1st defendant served the amended WSD after the mediation has been finalized hence denying the plaintiff the right to file reply to their WSD.

Another issue raised by the counsel for the plaintiff was that the 1st and 5th defendants were being represented by Advocate Cleofas James who is an employee of Mwanga Hakika Bank who is the 1st defendant. The counsel for the plaintiff was of the view that this might create a conflict of interest.

In reply to the issues raised, Mr. Galus Lupogo, State Attorney appeared for the 2nd, 3rd and 4th defendants. He admitted that personally he has never appeared for mediation. He quickly added that, on the office capacity, his

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office has never received a Notice or summons to attend mediation after the appointment of the Mediator.

He submitted in addition that, he agrees with the contents of provisions of Order VIII Rule 29 C of the CPC, but they are couched in discretionary powers of the Court and are not mandatory. That, according to the provisions of Order VIII Rule 29 C of the CPC, there are three orders in alternative which the Court may impose and not only dismissal or striking out the defence. He added that the Mediator did not impose any penalty or condition on the defendants who did not appear for mediation.

He concluded by praying for the Court to act leniently on the parties and allow the matter to proceed on merit.

Mr. Steven Mayombo, was representing the 1st and 5th defendants. He submitted on the issue of mediation that, there are two conditions for which the mediation may come to an end; one is under Order VIII Rule 29 C and two; under Order VIII Rule 33 both of the CPC. *Adle*

He argued that the present matter falls under Order VIII Rule 33 of the CPC. That the file was remitted to this Court under Order VIII Rule 33 (b) of the CPC implying that the mediation has been marked failed.

Mr. Mayombo averred that the remission of the file to the trial Judge was because the mediation failed not because of non-attendance of parties. He said that, the counsel for plaintiff has wrongly moved the Court to strike out the case for the defendants.

On the point of service of the joint amended WSD on June 2023, the counsel for the plaintiff has never produced the proof that they asked for the service of the copy of the amended WSD and were denied. He added that whatever happened was a human error and pray for the Court to grant the plaintiff time to file their reply to the WSD.

Mr. Benard Ngatunga, representing the 6th defendant, stated that, this Court have powers to amend the schedule order under Order VIII B, Rule 23 of the CPC. And for the interest of justice, the Court can amend the schedule order to accommodate the current situation.

In rejoinder, Mr. Frank mostly reiterated his submission in chief. He added that Order VIII Rule 33 of the CPC does not apply in the current situation

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and that the correct provision is Order VIII Rule 29 C of the CPC. That, the rest of the defendants did not attend the mediation except the 6th defendant, so the provisions of Order VIII Rule 29 of the CPC are applicable.

He reiterated his prayers.

Having heard the submissions by parties, the issue here is whether the issues raised by the counsel for the plaintiff are tenable. Order VIII C Rule 29 of the CPC provides for the circumstances where the party fails to attend mediation. It states thus;

29. Where it is not practicable to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator shall remit the file to the trial judge or magistrate who may;

a) Dismiss the suit if the non-complying party is a plaintiff, or strike out the defence, if the non-complying party is a defendant.

b) Order a party to pay costs.

c) Make any other Order it deems fit.

(Emphasis mine).

As per this Order VIII C Rule 29 of the CPC, the Mediator shall remit the file to the trial Judge where a party has failed to attend mediation session

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and makes it impracticable to conduct the said session. This is where the Mediator remits the case file to the trial Judge stating the reasons that the mediation could not be conducted due to failure of the party to attend. Upon receiving the case file stating the reasons for remitting the same, then the trial Judge may take necessary actions as provided under Order VIII C Rule 29 of the CPC.

With due respect to Mr. Frank, it is my view that the circumstances in this case does not fall within Order VIII C Rule 29 of the CPC. The mediation sessions in this case were conducted although in absence of the 1st -5th defendants. On failure of the parties who were present to resolve the matter by mediation, the case file was remitted to the trial Judge to proceed with the trial, as the mediation was marked failed.

The order of Mediator was as follows;

"File be remitted to the trial Judge to proceed adversarily as mediation has failed".

By this order, the Mediator remitted the case file to the trial Judge not because of non-attendance of the parties under Order VIII C Rule 29 of the CPC but it was for the reason that the mediation has failed after efforts by *Adle*.

the parties to resolve the matter amicably was unsuccessful. Hence, the case file was remitted under provisions of Order VIIIIC Rule 33 of the CPC.

Mr. Frank has moved this Court to strike out the defence of the 1st - 5th defendant, for reason of their failure to attend mediation sessions. However, I believe this Court can only do so when it receive the case file from the Mediator with the order that the mediation has failed because of failure of parties to attend. That is when, and only when the trial Judge can be moved to act under the provisions of Rule 29 of Order VIIIIC of the CPC.

I find that, the circumstances of this case do not fall under the said Order VIIIIC of the CPC hence this trial Court has no powers to strike out the defenses of 1st-5thdefendants as prayed by the counsel for the plaintiff. The first issue is dismissed.

On the issue of service of the amended WSD from the 1st defendant to the plaintiff as claimed by Mr. Frank, on 28/3/2023, this Court conducted 1st pretrial conference. Mr. Frank, counsel for the plaintiff was in attendance and informed the Court that they were ready for the said pretrial. He submitted to the Court that the pleadings were completed and there is no pending applications, discoveries or interrogatories. *Atts.*

If Mr. Frank told the Court that the pleadings were complete, then it means that the exchange of pleadings were completed, hence he cannot now claim that that he had not by that time of pretrial conference, received the amended WSD of the 1st defendant.

On 13/10/2022, the plaintiff prayed for amendment of plaint. The Court granted the prayers and ordered the schedule for amendment whereby after filing the amendment of plaint, the defendants had also to file their amended WSD, and the reply to the amended WSD (if any) was to be filed by 10/11/2022.

Since last year, the plaintiff have never raised concern on the failure of the 1st defendant to serve him with his amended WSD on time, but he waited until the matter have gone through the 1st pretrial conference and mediation to raise this issue.

I find that the claims of the plaintiff through his counsel are misconceived, and out of time and I dismiss them.

In addition, if the plaintiff feels that he needs to file reply to the 1st defendant's amended WSD, then he has to move this Court property under *Adls.*

Order VIII B Rule 23 of the CPC, for the amendment of scheduling order and give sufficient reasons to the Court.

On the issue of representation of the 1st and 5th defendants by the advocate who is an employee of the 1st defendant, Mr. Frank has not told the Court which provisions of law prohibit the advocate who is an employee of the party, to represent the said party in a suit.

In upshot, I find all issues raised by the counsel for the plaintiff to have no merit and therefore I dismiss them accordingly, with no order for costs. The suit shall proceed on merit.

Order accordingly.



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A. MSAFIRI

JUDGE

03/8/2023