

THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)
THE HIGH COURT – LAND DIVISION

(MUSOMA SUB REGISTRY)

AT MUSOMA

ORIGINAL JURISDICTION

LAND CASE No. 21 OF 2022

1. BWIRE NYAMWERO BWIRE
2. ROSE LAURENT MAGOTI } **PLAINTIFFS**

Versus

1. NATIONAL MICROFINANCE BANK PLC
2. SMALL INDUSTRIES DEVELOPMENT ORGANISATION (SIDO)
3. THE ATTORNEY GENERAL
4. SUBIA GENERAL SUPPLIES & TRIBUNAL BROKERS LIMITED
5. NUTMEG AUCTIONEERS & PROPERTY MANAGERS CO. LTD
6. ANNA NICHOLAUS KYAMBA } **DEFENDANTS**

**RULING ON THE APPLICATION OF ORDER VIII RULE 1 (3) & (14) OF THE
CIVIL PROCEDURE CODE [CAP. 33 R.E. 2022]**

10.10.2023 & 10.10.2023

Mtulya, J.:

This court on 11th September 2023, *suo moto*, noted that the present case proceeded in absence of the first, fourth and fifth defendants and no *ex-parte* order was prayed by the plaintiffs and issued by the court. The record shows that the first, fourth and fifth were served and declined appearance. Noting the same this court had invited the parties today morning to explain the way forward under such circumstances. According to the first plaintiff, the case

may proceed as per directives of the Court of Appeal (the Court) in the precedent of **National Bank of Commerce Limited v. Partners Constructions Co. Ltd**, Civil Appeal No. 34 of 2003, as the defaulting parties have no chances to appear and defend their cases. The move was supported by the second plaintiff.

On the other hand, **Mr. Davis Mzahula**, learned counsel for the first and fifth defendants thinks that this court cannot proceed with faults proceedings while it has the mandate under section 95 of the **Civil Procedure Code [Cap. 33 R.E. 2022]** (the Code) to regulate its own procedures for ends of justice. In his opinion, the enactment has already received the decision of the Court in **Rustamali Shivji Karim Merani v. Kamal Bhusham Joshi**, Civil Application No. 80 of 2009.

According to Mr. Mzahula, in the present case, there are no prayers and orders to proceed *ex-parte* as against the first, fourth and fifth defendants as required by **Order VIII Rule 14 of the Code**, and it is unfortunate that **Order VIII Rule 1 (3) of the Code** was enacted under the assumption that the parties are one plaintiff and one defendant. Mr. Mzahula submitted further that in the present case there are many parties and the case proceeded up to mediation stage without *ex-parte* order or participating the first, fourth and fifth defendant which makes the proceedings questionable as from when the indicated defendants were left

behind. Finally, Mr. Mzahula decided to let it to this court to resolve what it sees the end of justice to the parties.

Mr. Turoke Kitiya, learned State Attorney, for the second and third defendants thought that Mr. Mzahula is partly right in inviting section 95 of the Code, as this court had continued without *ex-parte* order on record against the first, fourth and fifth defendants. In his opinion, the order must be displayed on the proceedings for proper record before the case proceeds further, and if any party wants to dispute the order or wish to set aside, he may wish to do so by citing the proceedings. According to Mr. Kitiya, the issued order is not subject to appeal or revision as it does not resolve the dispute to the finality and in any case, it will not prejudice any party in the case.

I have glanced the enactment of section 95, Order VIII Rule 1 (3) and (14) of the Code and perused the cited precedents in **National Bank of Commerce Limited v. Partners Constructions Co. Ltd** (supra) and **Rustamali Shivji Karim Merani v. Kamal Bhusham Joshi** (supra). Order VIII Rule 1 (3) of the Code provides that:

The court may, on application by the defendant before the expiry of the period provided for filing a written statement of defence or within seven (7) days after expiry of that period and upon the defendant showing

good cause for failure to file such written statement of defence, extend time within which the defence has to be filed for another ten days and the ruling to that effect shall be delivered within 21 days.

Whereas Order VIII Rule 14 (1) of the Code provides that:

Where any party required to file a written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule 3 of rule 1, within the period of such extension, the court shall, upon proof of service and on oral application by the plaintiff to proceed ex parte, fix the date for hearing the plaintiff's evidence on the claim.

However, the law on the other hand gives room for a defendant, who so wish, to set aside the *ex-parte* order, before a judgment is pronounced, to register the application for enlargement of time with good cause. In the present case there is no displayed order on the record to allow the first, fourth and fifth defendants to enjoy the indicated rights. However, reading the procedure enacted in Order VIII Rule 1 (3) of the Code, if there is proof of service on record, like in the present case, and the defendant has not complied with the seven (7) days rule, it is impliedly that is an *ex-parte* order or call it a *deemed ex-parte* order. The question will only be how to dispute the *impliedly ex-*

parte order or *deemed ex-parte order*, without there being any proceedings on record to display the same. That is where the idea of Mr. Mzahula on inviting section 95 of the Code comes into play and the thinking of Mr. Kitiya is employed to display the order in the proceedings for proper record.

Having said so, and for interest of justice to the parties, and for want of proper record of the court, and noting the inherent mandate of this court enacted in section 95 of the Code, I make an order to meet end of justice. I am therefore moved to pronounce the *implied* or *deemed ex-parte* order by operation of laws against the first, fourth and fifth defendants is hereby put into text. This case to proceed *ex-parte* as against the first, fourth and fifth defendants. Parties to appear for necessary orders on 1st November 2023, at 09:00 hours.

Before I pen down, I want to make it clear that the cited precedents of the Court in **National Bank of Commerce Limited v. Partners Constructions Co. Ltd** (supra) and **Rustamali Shivji Karim Merani v. Kamal Bhusham Joshi** (supra), have not replied the instant question. The precedents cannot be invited and applied in this Ruling.

It is so ordered

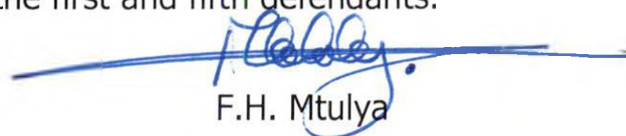



F.H. Mtulya

Judge

10.10.2023

This Ruling was delivered in Chambers under the Seal of this court in the presence of the plaintiffs, **Mr. Bwire Nyamwelo Bwire** and **Ms. Rose Laurent Magoti** and in the presence of **Mr. Kitiya Turoke**, learned State Attorney for the second and third defendants, and in the presence of **Mr. Davis Mzahula**, learned counsel for the first and fifth defendants.



F.H. Mtulya

Judge

10.10.2023