

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 749 OF 2022

(Arising from Land Revision No. 19 of 2022 before Hon. Fatuma Khalfan, J)

MISOZI MGANGA APPLICANT

VERSUS

**MUYA SEKONDO (As administrator of the
Estate of the late SEKONDO LUGODA) 1ST RESPONDENT**

HALIFA CHINAWA 2ND RESPONDENT

JUMA SALUM 3RD RESPONDENT

RULING

Date of last Order: 24.01.2023

Date of Ruling: 26.01.2023

A.Z.MGEYEKWA

Before me is an omnibus application preferred under section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019] and Order IX Rule 3 of Civil Procedure Code Cap.33 [R.E 2002]. Two basis prayers being sought for are as follows:-

- 1. That this Honourable Court be pleased to extend time for the applicant to file an application for setting aside a dismissal order dated 22nd September, 2022.*
- 2. That this Honourable Court be pleased to set aside the dismissal order dated 22nd September, 2022.*

The application is supported by an affidavit and supplementary affidavit deposed by Misozi Mganga, the applicant. The respondents resisted the application and demonstrated their resistance by filing counter affidavits. The first respondent filed a counter affidavit deposed by Muya Sekondo Lugoda, the 1st respondent. The 2nd and 3rd respondents are yet to file their counter affidavit. On 13th December, 2022, the learned counsel for the 1st respondent raised two preliminary objections as follows:-

- 1. The Application is omnibus hence incompetent in law.*
- 2. The Application is incompetent in law as the Court is moved with wrong provision of the law.*

As the practice of the Court has it, I had to determine the preliminary objection first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which we could not overlook.

When the matter was called for hearing preliminary objections raised by the 1st respondent, on 14th December, 2022, the applicant enlisted the legal service of Mr. Lutufyo Mvumbagu, learned counsel while the 1st respondent enjoyed the legal service of Mr. Changaluma, learned counsel. By the court order, the preliminary objection was argued by way of written submission whereas, the 1st respondent filed his submission in chief on 20th December, 2022 and the applicant filed a reply on 16th January, 2022. The 1st respondent's counsel waived his right to file a rejoinder.

The 1st respondent started to narrate the background of the application which I am not going to produce in this application. On the first limb of the objection, the 1st respondent contended that the instant application is omnibus and hence incompetent in law. The 1st respondent submitted that the instant application contains two different prayers and the same are enabled from two different legislation; the first prayer is made under the Law of Limitation Act, Cap. 89 [R.E 2019] and the second prayer is enabled under the Civil Procedure Code Cap. 33 [R.E 2019]. He stated that the applicant was not supposed to combine two different prayers. To fortify his submission, he referred this Court to the cases of **Zaidi Baraka and Others v Exim Bank (T)**, Misc. Commercial Application No. 28 of

2015 and **Rutagatina CL v Advocate Committee & Another**, Civil Application No. 98 of 2010.

The 1st respondent continued to submit that the Court of Appeal in **Rutagatina's** case discouraged the filing of omnibus applications which are lumped up together and are based either i) the prayers are on the different provisions of the law, (ii) if the prayers require different consideration to be taken and (iii) if the applicable jurisdiction is different. The 1st respondent insisted that the application is improper and incompetent fit to be struck out.

On the second limb of the objection, the 1st respondent contended that the application is incompetent in law as the Court is moved with a wrong provision of law. The 1st respondent submitted that the applicant filed Misc. Civil Application No. 749 of 2022 under section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019] and Order IX Rule 3 of Civil Procedure Code Cap.33 [R.E 2002]. It was his submission that the applicant has wrongly moved the Court by citing Order IX Rule 3 of Civil Procedure Code Cap.33 [R.E 2002] instead of citing Order IX Rule 3 of Civil Procedure Code Cap.33 [R.E 2002]. [R.E 2019]. The 1st respondent stated that according to the General Laws Revision Notice, 2009 GN No. 140 of 2020, the Civil Procedure was revised to a new revised edition and the same

need to be cited as Civil procedure Code Cap. 33 [R.E 2019], the same supersedes all previous editions including an edition of 2002 which do not exit. The 1st respondent argued that it is settled principle that wrong citation of law specifically the wrong revised edition will not mandate the Court to do what asked to do hence render the application incompetent.

In conclusion, the 1st respondent beckoned upon this Court to strike out the application with costs.

In reply, on the first limb of objection, the applicant's counsel submitted that the application is omnibus and the same is not fatal since it includes two interrelated prayers which are acceptable by the law. Fortifying his position he cited the cases of **Pride Tanzania Ltd v Mwanzani Kasatu Kasama**, Misc. Commercial Cause No. 230 of 2015 (unreported) the Court cited the case of **First Insurance Co. Ltd v Aron Kasele**, Civil Revision No. 1 of 2020 HC at Mbeya. The learned counsel for the applicant distinguished the cited case of **Rutagatina** (supra) from the circumstances of the application at hand.

On the second limb of the objection, Mr. Lutufyo partly agreed with the objection raised that the applicant erroneously cited the provision of law herein above and in doing so is not fatal to the extent of rendering the instant application incompetent as the same can be rectified by inserting

the proper provision of the law. To buttress his submission he cited the case of **Fatuma Salum Hamisi v Salum Abdallah Jogaya & 2 Others**, Misc. Land Application No. 528 of 2021 HC- Land Division.

In conclusion, the learned counsel for the applicant urged this Court to dismiss the preliminary objections in its entirety with costs for wants of merits.

I have heard the submission made by the 1st respondent and applicant's counsel in support and against the preliminary objections. Starting with the first objection, the 1st respondent argued that the instant application is bad in law because it is an omnibus application. There is no dispute that the applicant in the instant application has lumped two prayers; an extension of time to file an application for setting aside a dismissal order and to set aside the dismissal order dated 22nd September, 2022. Therefore, the question to follow is *whether the combination of the applicant's prayers can be entertained by this court*. In determining an omnibus application, Hon. Mapigano (as he then was) in case of **Tanzania Knitwear Ltd v Shamshu Esmail** (1989) TLR 48, Mapigano, J (as he then was) held that:-

"In my opinion, the combination of the two applications is not bad in law. I know of no law that forbids such a course. Courts of the law

abhor multiplicity of proceedings. Courts of law encourage the opposite."

Similarly, in the case of **MIC Tanzania Ltd v the Ministry for Labour and Youth Development and the Attorney General** Civil Appeal No. 103 of 2004 Dar es Salaam (unreported) delivered in December, 2006, the court held that:-

"... unless there is a specific law barring the combination of Application, the same must be encouraged to avoid multiplicity of cases."

Applying the above authority I find that the two prayers are properly before this court as they are not diametrically opposed to each other, one easily follows the other. Once an extension of time is granted then an application to set aside the dismissal order of this Court follows. However, I am alive that there are circumstances where the omnibus application might not save the purpose. For example in a situation where one of the provisions cited by the applicant is improper.

In the matter at hand, I noted a point of law and I called the learned counsel to address me whether this Court is properly moved to determine the second prayer made by the applicant to set aside the dismissal order of this Court.

Mr. Shaibu, counsel for the applicant was straight to the point, he stated that this Court is improperly been moved because of the wrong citation of the law. The 1st respondent was a layperson he left the matter in the hands of this Court to decide. As rightly pointed out by Mr. Shaibu, this Court is not moved to determine the second prayer made by the counsel for the applicant. The applicant in his Chamber Summons moved this Court to determine the second prayer under Order IX Rule 3 of the Civil Procedure Code Cap. 33 which states that neither party appeared when the suit was called for hearing. For ease of reference, I reproduce Order IX Rule 3 of the Civil Procedure Code Cap.33 [R.E 2019 hereunder:-

"Where neither party appears when the suit is called on for hearing the court may make an order that the suit be dismissed."

Reading the court records, it shows that on 22nd September, 2022 when the matter was called for hearing, Mr. Henry Kimaro, counsel for 1st respondent appeared in Court and moved this Court to strike out the matter for nonappearance of the applicant. Therefore, it is neither part appeared when the matter was called for hearing.

Based on the above provision of law, it is clear that this Court cannot determine both prayers, and hence the omnibus application cannot stand. I shall not consider the second objection raised by the 1st respondent as

the same shall be an academic exercise after the findings I have made herein.

In the event, I proceed to strike out the application for being incompetent before this Court without costs.

Order accordingly.

Dated at Dar es Salaam this date 26th January, 2023.

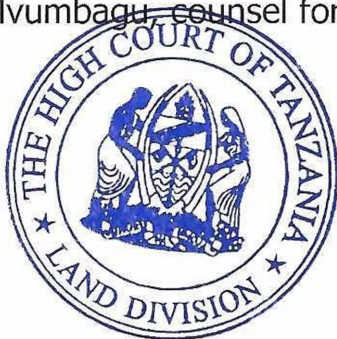



A.Z.MGEYEKWA

JUDGE

26.01.2023

Ruling delivered on 26th January, 2023 in the presence of the 1st respondent and Mr. Shaibu Chagaluma, holding brief for Mr. Lutufyo Mvumbagu, counsel for the applicant.




A.Z.MGEYEKWA

JUDGE

26.01.2023