

TANZANIA / JUDGMENT

adinani kimomwe vs gharib nassoro

2023 tzhclandd 16431 20 april 2023

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20 April 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM CIVIL APPLICATION NO. 842 OF 2022 ADINANI

KIMOMWE..... APPLICANT VERSUS GHARIB
NASSORO..... RESPONDENT

RULING

Date of Last Order: 27/3/2023 Date of Ruting: 20/4/2023 A. MSAFIRI, J. The applicant has lodged an application in this Court by way of chamber summons under Section 2(3) of Judicature and Application of Laws Act, Cap 358 R.E 2019, (the JALA), Order IX Rule 6 (1) and Section 95 of the Civil Procedure code Cap 33 R.E 2019 (the CPC). The application is supported by an affidavit of Amin Mohamed Mshana, advocate for the applicant. The applicant is seeking for the Court to set aside its dismissal order dated 06/12/2022 in Misc. Land Application No. 719 of 2022, and dismissal order in Misc. Land Application No. 492 of 2022 dated 19/10/2022. The respondent filed his counter affidavit in which he raised a preliminary objection on two points of law that; first, that, there is non citation of law, and second, that the Applicant's application is bad in law for containing omnibus prayers. jL/ / i To save time, this Court ordered that the preliminary objections and main application be heard simultaneously. It was also ordered that the same be heard by way of written submissions. The parties have complied with the schedule of the Court. Starting with the raised preliminary objections, the respondent submitted on the first limb of objection that there is noncitation of law. That the enabling provisions of law cited by the applicant does not support the prayers of chamber summons. The respondent submitted further that, Order IX Rule 6(1) of the CPC provides for remedy when a suit is dismissed and not when the application is dismissed. He added that the referred Section 2(3) of JALA and Section 95 of the CPC is about the inherent powers of the Court which is solemnly vested to the High Court. The respondent said that, it trite law that non citation or wrong citation of enabling provision of the law renders the application incompetent. To buttress his arguments, he cited among other cases, the case of Edward Bacha & 3 others vs. the Attorney General & Another, Civil Application No. 128 of 2006. On the second limb of preliminary objection, the respondent averred that the Application is bad in law for containing omnibus prayers. He said that two or more independent matters cannot go together in one application, unless they are interrelated and can conveniently

be jointly determined by the Court. He cited the case of Geoffrey Shoo & another vs. Mohamed Saidi Kitumbi and 2 others, Misc. Application No. 109 of 2020, High Court Land Division, DSM (unreported). Jm L. 2 He stated further that, the chamber summons contains three prayers namely, an order to set aside dismissal order dated 06th December 2022 in Misc. Land Application No. 719 of 2022 which seeking to set aside another dismissal order in Misc. Application No. 492 of 2022 and restoration. He said that the prayers in the chamber summons are not interrelated. In the respondent's view, the applicant should have first filed for Application to set aside dismissal order in Misc. Land Application no. 719 of 2022, if granted then he would have proceeded with the hearing of Misc. Land Application No. 719 of 2022 to be determined on merit in order to determine Misc. Application No. 492 of 2022. He pointed that the application containing two different distinctive applications is incompetent. He prayed for the objections to be sustained and the application be dismissed with costs. The reply submissions was drawn and filed by Mr. Amin Mohamed Mshana, advocate for the applicant. He submitted that the objections have no merit hence they ought to be dismissed with costs. On the first limb of objection, Mr. Mshana stated that there is obviously a citation of law contrary to the respondents' claims that there is noncitation of law because the respondent himself has referred to the same at page 1 last paragraph of his submission. In addition Mr. Mshana submitted that an application is a suit that is why order IX Rule 6(1) of the CPC was cited. /L' / XAAJi 3 He cited the case of Tanzacoal East Africa Mining Limited vs. Minister for Energy and Minerals, [2016] TLR at page 163, whereby the suit was interpreted broadly to include also appeals and application. Mr. Mshana argued that basing on the above provision, this application is also a suit. He prayed for the dismissal of this limb of objection with costs. On the second limb of objection, Mr. Mshana contended that the Application sought to be restored through setting aside its dismissal order is none other than Misc. Land Application No. 719 of 2022. He said that, it is indeed correct that setting aside dismissal order automatically restores Misc. Land Application No. 719 of 2022. Its hearing on merit, in case it succeed, will take the parties to Misc. Land Application No. 492 of 2022. He prayed that the objection be dismissed with costs. There was no rejoinder. Having gone through the submissions by the parties on the raised preliminary objections by the respondent, the issue is whether the objections have merit. On the first limb of objection, on citation of the law, the respondent averred that the provisions of law relied by the applicant to move the Court are not appropriate. I agree with Mr. Mshana that the respondent has confused the state where there is noncitation and wrong citation. I said so because, the applicant cited the enabling provisions of law. The application is made under Section 2 (3) of JALA, Order IX Rule 6(1) and Section 95 of the CPC. M 4 Therefore, there is no a noncitation citation of law because the application is brought under the provisions of the law. Whether they are wrong provision, then this is my second determination. Determining this objection, I read the enabling provision, Section 2 (3) of JALA is on the jurisdiction of the High Court to determine Civil and Criminal matters. Order IX Rule 6(1) of the CPC provides for a procedure to set aside the dismissal order where a suit is wholly or partly dismissed. I agree with the submission of Mr. Mshana, counsel for the applicant that there is no specific provision for seeking order of the Court to set aside or restore the dismissed application. That is why the applicant cited the enabling provisions of the cited laws. In addition, I agree that despite that, the application is a suit as it was well put in the

cited case of Tanzacoal East Africa Mining Limited vs. Minister for Energy and Minerals, (supra). I find that the cited enabling provisions are correct in law and I overrule the first limb of objection. On the second limb of objection, the respondent has claimed that the application is bad in law as it contain omnibus prayers. The prayers by the applicant as in the chamber summons are as follows;

1. That this Hon. Court be pleased to set aside its dismissal order dated 06/12/2022 in Misc. Land Application No. 179 of 2022 seeking to set aside another dismissal order in Misc. Land Application No. 492 of 2022 entered on 19/10/2022 and restore the same for further process.
2. Costs be provided for. By the prayers in the chamber summons, the prayers are not omnibus as believed by the respondent. This is because the applicant is not asking for two prayers which may or may not be interrelated. What the applicant is asking is one prayer namely setting aside the dismissal order dated 06/12/2022 in Misc. Land Application No. 719 of 2022 and the same be restored. It is only after restoration of Misc. Land Application No. 719 of 2022 and its determination on merit when the prayer to set aside Misc. Land Application No. 492 of 2022 can be sought. I firmly believe that the respondent has misdirected himself on the contents of the prayers sought in the chamber summons. If he could have read carefully the sought prayers, the respondent could have realized that the prayers in the chamber summons are not omnibus, actually the prayer is one i.e. the setting aside and restoration of Misc. Land Application No. 719 of 2022. For the foregoing reasons, I find that the two raised preliminary objections have no merit and I overrule them with no order as to the costs. The preliminary objections having been overruled, I will proceed with determination of the application on merit. The applicant is seeking for this Court to set aside its dismissal order dated 06/12/2022 in Misc. Land Application No. 719 of 2022. Having gone through the affidavit of the counsel for the applicant, the issue is whether there are sufficient grounds advanced by the applicant for his absence on 06/12/2022 when the said Application No. 719 of 2022 was set for hearing. The reasons advanced are in the affidavit supporting the application and which are further submitted in written submission by Mr. Mshana. In the affidavit, Mr. Mshana deposed that, the Application results from the dismissal order of 06/12/2022 in Misc. Land Application No. 719 of 2022 attempting to set aside another dismissal order of 19/10/2022 in respect of Misc. Land Application No. 492 of 2022. However, instead of the affidavit showing/giving out the reasons for the applicant's nonappearance on 06/12/2022 when Misc. Land Application No. 719 of 2022 was dismissed, the applicant's counsel in his affidavit has shown reasons for nonappearance in Misc. Land Application No. 419 of 2022. This is clearly seen in paragraphs 3 and 6 of the affidavit. However, this Court took this to be the typographical error where the counsel meant Application No. 719 of 2022 instead of Application No. 419 of 2022. Going with that stance, the counsel stated that on 30/11/2022 when Application No. 719 of 2022 was called for Mention, he was in Court with advocate Anitha Katema from his office where by they did not hear the case being called and they

kept waiting until afternoon when they departed the Court. The said advocate Anita Katema has sworn an affidavit to prove the Counsel for applicant's claims. However, I find this difficult to believe because the procedure of calling the case is through a loudspeaker. Even if the counsel for the applicant Mr. 7 Amin Mshana and Anita Katema could not have heard their case being called through the loudspeaker, they could have made inquiries through the Court Clerk or in the presiding Judge's chambers. Mr. Mshana have not told the Court whether he made any efforts to inquire on the matter instead of just waiting from the morning until late afternoon. At paragraph 4 of the affidavit, Mr. Mshana avers that, in the Ruling, it shows that the case has previously been called on 14/11/2022, but he was unaware of that date. That, the chamber summons shows that, the first mention date was on 30/11/2022. It is my view that, even if the parties were summoned to appear on 30/11/2022 as the purported chamber summons shows, it does not justify the applicant's non appearance on the scheduled date because indeed, neither the applicant nor his advocate appeared on 30/11/2022. At paragraph 5 of the affidavit, the counsel states that he got information from Tams Judiciary Case Management System that the application was set for hearing on 06/12/2022 but he has not been served with the counter affidavit of the respondent. I am of the view that, the fact that the applicant is the one who filed the said application in the Court, it was his obligation to pursue and attend the same. The contents of paragraph 5 of the affidavit shows clearly that the applicant/counsel for the applicant has neglected his duty of attending to his application. He was unaware of the schedule date of the application such that he has to get information from Tams Judiciary Case Management System. JmvL 8 The claim that the applicant has not been served with counter affidavit does not justify his absence in Court. He could have entered appearance before the Court on the scheduled date and inform the Court that he has not been served with the said counter affidavit. Mr. Mshana stated that, if this application is granted and the sought Application for leave to appeal is restored and heard, the chances of success are enormous. The respondent who was appearing in person vehemently objected to the application and submitted that the applicant has failed to provide for sufficient reasons of his non appearance on the date scheduled in the application. Having gone through the advanced reasons and analysed them, I find that the applicant through his counsel has not advanced sufficient reasons to justify his nonappearance on the date when Misc. Land Application No. 719 of 2022 was set for hearing and was eventually dismissed for want of prosecution. For the foregoing reasons, I hereby dismiss this application with costs. JUDGE 20/04/2023. 9

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Prepared on 13 October 2026 · Esheria