

TANZANIA / JUDGMENT

shukrani mkaluka vs kangwina matinde 90 others 2023 tzhclandd 1 18 january 2023

COURT
TANZLIIDECIDED
18 January 2023

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF TANZANIA AT SUM BAWANG A MISCELLANEOUS LAND APPLICATION
NO. 22 OF 2022 (Arising from Land Case No. 01 of 2020 High Court of Tanzania, at Sumbawanga,
before Honourable F Nkwabi, J) SHUKRANI MKALUKA
APPLICANT VERSUS KANG'WINA MATINDE AND 90 OTHERS RESPONDENTS

RULING

10* November, 2022 & 18* January, 2023 A.A Mrisha, J: This is an application to set aside Ex-parte Judgment delivered on 30th August, 2022 by Honourable Judge F. Nkwabi through Land Case No. 1 of 2020. The application was made under Order IX Rule 9 and section 95 of the Civil Procedure Code Revised Edition 2019 [The CPC] in which the applicant is seeking to move this Court for the following orders inter alia: -

- 1) That this Honourable court be pleased to set aside ex-parte judgment delivered on 30th August, 2022. i
- 2) Any other relief (s) this Honourable court deem fit and just to grant. The background to the matter is, briefly that the respondents, who were the plaintiffs in the main suit that is Land Case No. 1 of 2020 sued the applicant and 128 others who were the defendants in that main suit, for a piece of land which is located at Stalike and Igongwe Villages, within Nsimbo District in Katavi Region. In the said suit the respondents sought .for the reliefs that all the said defendants (respondents) be evicted from the suit land, permanent injunction be issued against all the defendants, their relatives, servants and anyone coming from their orders, general damages for trespass, recovery of agricultural products to a value of the rice price as per 20 bags, per each acre from the time of evasion up to the day of return of the land, Tanzania shillings 250,000/=per each day from the day of Judgment up to the day of return of the land, and costs of the suit. When the matter was scheduled for mediation, the defendants did not appear then the court struck out written statement of defendants under Order VIII(c) Rule 29 of the CPC at the instance of the prayer lodged by the counsel for the plaintiffs. 2 Thus, the ex-parte hearing proceeded and trial court declared the plaintiffs to be the lawful owners of the suit land. Consequently, the Court granted the plaintiffs the following reliefs, thus; vacant possession of the suit land, forceful eviction of the

defendants, in case they could neglect to vacate from the suit land, permanent injunction against all the defendants, their relatives, servants, agents and anyone coming from their orders. Others reliefs were general damages for trespass at the tune of Tshs. 100,000,000/- (a hundred million Tanzania shillings), recovery of agricultural products to a value of the rice price as per 20 bags per each acre from the time of evasion to the day of return of the land and the defendants were ordered also to pay costs of the suit and the suit land was declared to be the property of the plaintiffs (now the respondents). Subsequently upon being aggrieved by the said decision, on 22nd September, 2022 the applicant knocked the doors of this court with a view of challenging the decision of the court which was delivered in favour of the respondents, as indicated above. When the matter came for hearing on 10th November, 2022 Mr. Bartazary Sichilima Charribi, counsel for Respondents, informed this court that they 3 filed a Preliminary Point of Objection that they would wish to argue before the matter proceeds further. On his part the applicant agreed to proceed with the Preliminary Points of Objection, as prayed by his fellow learned brother. Arguing in support of the first limb of the preliminary objection as described above, Mr. Chambi contended that the application is untenable in law as the same is raised out of misconception of law. He went on to say that the applicant filed his application under Order IX Rule 9 of the Civil Procedure Code, Cap 33 R.E. 2019 and prayed to this court to set aside ex- parte judgment delivered on 30th August, 2022. According to him in order to properly move the court on such prayer, the plaintiff ought to file his application under Order VIIIC Rule 3 of the CPC within seven days and explain the reason why the Written Statement of Defence should be considered. Mr. Chambi submitted further that, if the court satisfied with the reasons the applicant should file Written Statement of Defence and all procedure will start again. Mr. Chambi forcefully argued that Order IX Rule 9 of the CPC applies when the suit is called on for hearing, the court shall make an order of setting aside the dismissal order, but the scenario is different in this case. He said the trial court strike out written statement of defence for failure of the defendants to appear during mediation. Having failed to comply with the mandatory provision of law, Mr. Chambi argued, the application is subject to dismissal. Arguing in support of the second limb of the Preliminary; Mr. Chambi strenuously contended that the application is hopelessly filed out of time. According to him Order VIIC, Rule 30 of the CPC, the applicant should file an application to set aside striking order of Written Statement of Defence within seven days, from the date of the said order which strike out his written statement of defence. He argued that the order of striking out the defendants' written statement of defence was made on 16th June, 2022 and the application to restore the written statement of defence should have been filed on or before 17th June, 2022; however, about 3 months lapsed without the applicant's filing. Mr. Chambi further argued that since applicants did not even file an application for extension of time to file an application to set aside the ex- parte judgment as per section 3 of the Law of Limitation Act, Cap 89 R.E. 2019; hence he is time barred. In reply to the first limb of the preliminary objection, the applicant who represented himself, forcefully submitted that he filed an application to set aside expert judgment delivered on 30th August, 2022 by Hon. John Nkwabi, J under Order IX Rule 9 and section 95 of the CPC. The application was

supported by an affidavit of Shukran Mkaluka. All in all, he valiantly argued that the application is tenable in law and it is within time. Turning to the second limb of the preliminary objection on time, the applicant strenuously submitted that the application was filed on 16th September, 2022 which is within the prescribed time. To buttress his argument the applicant submitted that he filed an application to set aside expert judgment and not the application of restoration of the written statement of defence. He therefore concluded that the application before this court is filed within time and he prayed that the preliminary objections be dismissed with costs and requested the court to proceed with hearing on merit. 6 In his brief rejoinder Mr. Chambi argued that the application to set aside judgment does not cure the situation, the ex-parte judgment was made after written statement of defence was struck out. Therefore, the applicant ought to file an application for restoration of an ex-parte judgment in order to have his defence. He therefore, argued that since the applicant's application is time barred then the same should be dismissed. From the submissions made by both parties which I am grateful, the issue that clearly emerges and cries for determination is whether the present application is properly filed before this court or rather whether this court has jurisdiction to entertain the present application. Mr. Chambi on his part has argued that the applicant should have filed his application under Order VIIIIC Rule 3 of the CPC within seven days from the date of the and explain the reason why the Written Statement of Defence should be considered, while the applicant on his part submitted that he filed an application to set aside expert judgment delivered on 30th August, 2022 by Hon John Nkwabi, J under Order IX Rule 9 and section 95 of the CPC. In order to put things into their right perspectives, I wish to reproduce the provision of Order IX Rule 9 of the CPC, as follows:- Ru/e 9. In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also. . As I earlier on pointed out, the applicant tried to convince this court that Order IX Rule 9 of the CPC is the proper provision to be used to salvage the current situation by this court to strike out the expert judgment and 8 allowed to enter his defence. However, I am not prepared to do that for several reasons. One, the provisions of Order IX Rule 9 of the CPC is normally used when the decree is passed ex parte against defendant; the defendant may apply for an order to set aside the decree as against him and satisfy the court that there was sufficient cause for his non-appearance when the suit was called on for hearing. The applicant in this matter he was among the defendants in the Land Case No. 1 of 2020 where the case was heard ex-parte after the defendants had failed to appear during mediation. Two, more seriously the provision of Order IX Rule 9 of the CPC which was cited by the applicant empowers the defendant to make any application for restoration provided he is able to satisfy the Court about the cause of his non-appearance when the suit was called on for hearing. It is evident

therefore that Order IX Rule 9 deals with the ex-parte decree passed against a defendant, when the suit is "called on for hearing" and not in case of the applications for restoration of a suit or order of the court. The scope of enquiry is limited to finding out whether there is "sufficient cause for non-appearance" when the suit is called on for hearing. Therefore, in order to attract the provisions of Order IX Rule 9 suit must be called on for hearing, and in order to grant restoration of the suits under Order IX of the CPC, the Court must be satisfied that there are sufficient causes for non-appearance at the time when the suits were called on for hearing. In the present case the matter was ordered ex-parte at the stage of mediation when the defendants failed to attend scheduled date; as result a hearing took off ex-parte, but in presence of the respondents and the judgment was pronounced ex-parte in favour of the respondents. On proper reading of the relevant provision of Order IX Rule 9 of the CPC, it appears to me that in the facts and circumstances of this case Order IX Rule 9 can have no application. See the cases of Joseph Hodari Lika pi te vs Tatu Juma Kisowil and another, Misc. Land Application No. 775 of 2018 HC DSM and National Bank of Commerce Ltd vs Juma Motors Transport Ltd and three others, Misc. Land Application No. 612 of 2019. Basing on the above findings, I am therefore satisfied that the first limb of objection has merit and it suffices to strike out this application. io However, for the sake of completeness and to serve an academic purpose, I will also address the second limb of the preliminary objection. As rightly pointed out by Mr. Chimbi, the remedies for the applicant to salvages the situation is to file an application under Order VIII C Rule 30 of CPC to set aside the ex-parte judgment. It is important to reproduce such Order VIII C Rule 29 and 30 of the CPC for easy of reference. "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; or
- (c) Make any other order he deems just. 30(1) any party aggrieved by an order made under the above rule shall, within seven days from the date of the ii order, file in court an application for restoration of a suit or a written statement of defence." [Emphasis added] Mr. Chimbi sought to convince this court that since the written statement of defence was strike out for failure to attend mediation session on 10th June, 2022, the applicant was supposed to file an application for restoration on 17th June, 2022. Since, the order was made, it was about three months up to the date of hearing of this application, the applicant did not move the court seeking for an order to restore the written statement of defence. He further submitted that time for filing an application for restoration was lapsed; he cemented his argument by referring to the provisions of section 3 of the Law of Limitation Act, Cap 89 R.E. 2019. The applicant in that point submitted that he filed his application on 16th September, 2022 which is within time. Nevertheless, the applicant filed an application to set aside expert judgment and not an application for restoration of written statement of defence. That being the case

therefore, it is evident, as was rightly submitted by Mr. Chimbi, that the applicant was supposed to filed an application for restoration of written statement of defence under Order VIIIC Rule 30 of the CPC rather than filing the present application. 12 The provision of Order IX Rule 9 of the Civil Procedure Code provides for procedure to set aside dismissal order where the suit is dismissed for want of prosecution but when the decree is passed ex-parte against the defendant as in the present case, the proper provision is Order VIIIC Rule 30 of the Civil Procedure Code. Therefore, the Court was improperly moved and the application is out of time. Having found that the respondents' preliminary objections have merit, I hereby proceed to dismiss the application with costs. 13 Date 18/01/2023 Coram Hon M.S. Kasonde - DR Applicant Absent Respondent Mr. Baltazar Chambi, Advocate B/C A.K. Sichilima Mr. Baltazar Chambi - Advocate: I represent herein, the matter is scheduled for ruling and we are ready. Court: Ruling delivered this 18th day of January, 2023 in the presence of Mr. Chambi Advocate. For the respondents and in absence of the applicant.____ — M.S. KASONDE----- OgB r'pEPUTY REGISTRAR tx IM 18/01/2023 14

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/257482/source_file/shukrani-mkaluka-vs-kangwina-matinde-90-others-2023-tzhclandd-1-18-january-2023.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/shukrani-mkaluka-settingasideex-partejudgment-tanzlii-2023

Prepared on 13 October 2026 · Esheria