

TANZANIA / JUDGMENT

VICTOR BATULE APPLICATION DEPARTURE OF AND JUDG ON ADMISSION

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1 July 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF
SHINYANGA AT SHINYANGA MISC. CIVIL APPLICATION NO. 16111 OF 2024

1. VICTOR M. BATULE
2. JUMANNE GUGUYE
3. BONIPHARCE K. MICHAEL
4. DICKSON JOHN
5. NEEMA M. KIDAI
6. FREDRICK GEORGE
7. SAKISAKI KIGANJA
8. MODESTER ROBINSON
9. MAKOYE GOSE
10. KIMOLA KIPEJAAPPLICANTS
11. ALLY JUMA
12. AMOS MWITA
13. CHAGU MADUHU
14. MAKWI KANGA
15. RABEKA JULIUS
16. JOSEPH S. MARWA
17. HAPPYNESS BAHARINI

18. MASHAKA MAGU 1 VERSUS JOHN WAMBURA BINA t/a JOHN W. BINA GOLD
MINE.....RESPONDENT

RULING

27th August & 12th September, 2024. S.M. KULITA, J. This application has been filed by way of chamber summons in terms of Order VIII, Rule 23 and Order XII, Rule 4 of the Civil Procedure Code [Cap 33 RE 2019] in which the applicant seeks for the following reliefs;

- (a) The applicants be granted leave to depart from the scheduling order dated 25th June, 2024 upon which to present an application for judgment on admission against the respondent herein who is the defendant in the Civil Case No. 24 of 2023, the main case.
- (b) The court may be pleased to grant an order for judgment on admission in the Civil Case No. 24 of 2023, the main case
- (c) Costs of the suit.
- (d) Any other relief and or direction the Court shall deem fit to grant. 2 The application is supported with an affidavit sworn by Protace Kato Zake, Advocate for the Applicants herein on the 1st day of July, 2024. In a nut shell the information as can be gathered from the applicants' affidavit is that, parties herein are plaintiffs and defendants in the Civil Case No. 24 of 2023 in this same Court. The applicants' Advocate claims to have been served with the respondent's written statement of defense on 26th June, 2024 just one day after the Court had finalized the First Pre-Trial Conference on 25th June, 2024. On that circumstance, the Applicants' Advocate claims to have failed to file a reply to the Respondent's Written Statement of Defense (WSD). The Counsel added that the said WSD is also defective for containing evasive denial, the thing which prompt them to apply for judgment on admission. As the Scheduling Order had already been made, then the applicants herein, now pray for the court to depart from it, thus they be allowed to present application for judgment on admission after they have noted the defect on the Respondent's (Defendant's) WSD. On 6th August, 2024 the matter was fixed for hearing through written submissions, and both parties complied with. Mr. Protace Kato 3 Zake, Advocate, represented the Applicants, whereas Mr. Audax Theonest Constantine, Advocate, represented the Respondent. Submitting in support of the application, particularly on the prayer for departure from the scheduling order that was made on 25th June, 2024 in the Civil case No. 24 of 2023, Mr. Zake gave the reason that, he, as the applicants'/plaintiffs' counsel, was served with the Defendant's/ Respondent's WSD on 26th June, 2024. He is thus of the opinion that, that late service of WDS by the Defendant's/Respondent's counsel, hindered him from raising that, the defendant's WSD contains evasive denials, hence this application for judgment on admission. As for the second prayer on the judgment on admission, Mr. Zake stated that, his prayer stands on the reason that, the Respondent's/Defendant's WSD contains evasive denials. He opined that; evasive denials are as equal as constructive admissions on the claims by the Plaintiffs/Applicants. Cementing on his positions, Mr. Zake cited many authorities including Beda Y. Mgaya t/a BEPCA Technical and Supplies vs. The

Hon. AG and Minister for Agriculture Food and Security and Cooperative, Civil Case No. 112 of 2019, HC at DSM, and the case of Junior Construction Co. Ltd and 2 Others vs. Mantrac Ltd, Civil Appeal No. 252 of 2019, 4 CAT at DSM. He, as well cited MULLA THE CODE OF CIVIL PROCEDURE, 18 ed. Vol.2 Lexis Nexis. In reply Mr. Audax Constantine, Advocate for the respondent, remained mute on the issue of departure to the scheduling order. His reply concentrated on the second issue, that the applicants be granted judgment on admission. On it, Mr. Audax admitted that, the respondent's/defendant's WSD contains evasive denials, but he was quick to respond that, that was the negligence of Mr. Kirigiti, the respondent's/defendant's former Advocate. He then prayed that, his fault should not be used to punish innocent person (respondent). On the said defect found in the WSD, Mr. Audax denied the grant of judgment on admission. He thus proposed for three options to be adopted by the court; Firstly, that, as the applicants' claims in their plaint are specific in nature, then this court should order an oral proof of the same as per Order VIII, Rule 5 of the Civil Procedure Code (CPC). To bolster this position, Mr. Audax, Advocate, cited the case of Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137. On a second stance Mr. Audax stated that, under Order XII, Rule 4 of the CPC, judgment on admission is the court's discretion. He thus prayed for this court to refrain from granting judgment on admission, 5 instead require the parties to prove their cases on merits. He buttresses this position with the case of Sapphire Abdulrahim Latif Wagu vs. Asha Abdulrahim Wagu and 2 Others, Civil Case No. 27 of 2015, HC Zanzibar and sections 3A (2) and 3B(1)(a) of the CPC. Thirdly Mr. Audax stated that, under Order VI, Rule 16 of the CPC, for the interest of justice, the court should allow respondent make amendment or make better his WSD. He cemented his position with the case of George M. Shambwe vs. Attorney General and Another

[1996] TLR 334. Mr. Audax further showed that, in the Civil Case No. 24 of 2023 of which judgment on admission is sought for, two plaintiffs had withdrawn from the conduct of the case but still this application contains all plaintiffs as if nothing has happened. Lastly, Mr. Audax stated that, worse enough, the plaint in Civil Case No. 24 of 2023, its verification has been signed and verified by only two plaintiffs. With this, he was of the views that, the said plaint is not attributed to the rest of the plaintiffs who did not sign and verify in it. He alleged that this is a position of the law as per Order VII, Rule 14 and 15 of the CPC. 6 With these submissions, Mr. Audax prayed for the application be dismissed with costs. In rejoinder Mr. Zake reiterated what he had stated in his submissions in chief. He just added that, the case of Zuberi Augustino is distinguishable to the case at hand. As for the issue that, the Respondent should not be punished for the mistakes of his advocate, Mr. Zake submitted that, this argument is misplaced because the defendant himself is the one who signed and verified his WSD. Further, Mr. Zake admitted that, judgment on admission is upon discretion of the court, but he distinguished the cited case of SARPHIRE (supra) contending that, in that case, there are some facts which were admitted, but there were some issues required to be proved. On the issue of signing and verifying the plaintiffs' pleading, Mr. Zake stated that, the counsel for the respondent has raised it unprofessionally at the bar, though he replied that, the same being signed by only two

plaintiffs instead of all, is correct as per Order VI, Rule 14 and 15 of the CPC. I have earnestly gone through both parties' pleadings, annexures, and authorities. I have also taken full consideration of both parties' 7 submissions. From those things I find the basic issue for determination is whether the applicant's application is meritorious. The record is clear that, this application is moved with two main prayers, that is, departure from the scheduling order and grant of judgment on admission in Civil Case No. 24 of 2023. In its look like, this application is omnibus. However, it is proper before this court as the prayers do not diametrically oppose each other. Hence, the court, is right to determine the same. Concerning the issue of departure to the court's scheduling order, Mr. Zake gave reasons that, in the Civil Case No. 24 of 2023 they were served lately with the respondent's WSD. This fact is also incorporated in the applicants' affidavit in support of this application. However, the fact that, the applicants have been lately served with the respondent's WSD has neither been disputed in the respondent's counter affidavit nor in their submissions, as correctly submitted by Mr. Zake, I concur with it, that, silence of the respondent on this prayer, should be taken as the respondent does not oppose this prayer by the applicants. On that account, the applicants' prayer for the court to depart on its scheduling order of 25th June, 2024 is hereby granted. 8 Secondly, the applicants' prayer for the court to grant of judgment on admission in the Civil Case No. 24 of 2023 due to the respondent's/defendant's WSD containing evasive denial. With this aspect, as according to the parties' submissions, there is no dispute that, the respondent's/defendant's WSD contains evasive denials. What the parties differ is only that, what should be a way forward then? As correctly submitted by both parties to the case, of which I agree with them, an order for judgment on admission is purely a question of discretion of the court. This can easily be seen on the wordings of Order VII, Rule 4 of the CPC, which the applicants have also used in moving this application. The same provides; "Any party may at any stage of a suit, where admissions of fact have been made either on the pleading, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just" 9 However, it is trite law that, courts are required to exercise its discretion judiciously and by providing reasons in doing so. While confining myself to the above stated bounds, I find the crucial issue to be determined here is, whether this application, under the prevailing situations, fits for grant of judgment on admission. The record is to the effect that, Civil Case No. 24 of 2023, of which the applicants seek for judgment on admission to be entered, was instituted by all 18 applicants. Be it noted that the plaint shows that, all of the plaintiffs seek for an order to be paid by the respondent a total sum of Tshs. 1,474,750,100/=. That amount of money, is claimed to be the loss specifically entered by all 18 applicants, allegedly after the respondent had buried and destroyed their respective properties. The applicants too jointly prayed in their plaint, for the general damages at the tune of Tsh. 300,000,000/=. However, on 18th July, 2024, two of the applicants, namely, Victor Batule and Ally Juma, withdrew themselves from the conduct of the case, after they had lost interest to it. To date, the plaintiffs/applicants have not prayed

for amendment of their plaint, so as to have a real reflect of the case on the number of plaintiffs, and the amount that has remained in the claim, after two of the plaintiffs having withdrawn 10 themselves. Amendment of the plaintiffs' plaint to that effect was of most importance, so that, if judgment on admission is granted, then, those who had withdrawn themselves from the case, should have no chance to take advantage of it. But in this case, amendment of plaint to that effect, has not been done. Secondly, the plaintiffs'/applicants' plaint shows that, their claims against the respondent are specific ones. It is trite law that, specific damages must specifically be proved. A mere mentioning that, one person lost a certain property, without specific proof that the same existed and truly destroyed by the respondent, that will give chance to exaggerations as to the actual figure which is claimed. Thus, judgment on admission in this case will defeat justice which has been sought to be protected under the principle that, specific damages should be proved specifically. Guided with the above circumstances I have endeavored to show, with the prevailing existence of the Oxygen Principle as enshrined under sections 3A(2) and 3B(1)(a) of the CPC, I find it safe and better to order the Civil Case No. 24 of 2023, to proceed inter-parties and on merit, as it was held in the cited case of Sapphire Abdulrahim Latif Wagu (supra) which is not distinguishable to the present situation. 11 On that account, with the prevailing situation of the case and as the court has agreed on depart from its scheduling order made on 25th June, 2024, I hereby order the applicants/plaintiffs to amend their plaint within 14 (fourteen) days from today, to reflect the afore stated changes. The respondent/defendant is also ordered to amend his WSD within 14 days, after being served with the copy of amended plaint. Plaintiffs should then file their reply to the defendant's WSD, if any, within 7 (seven) days thereafter. By doing so the court will have a clear picture of the dispute between the parties, hence reaching into substantive justice. In the upshot, I find this application meritorious to that extent. As the departure on the scheduling order that has been made favors both parties to the case, as per Order VIII, Rule 23 of the CPC, I hereby order each party to bear its own costs. S.M. Kulita JUDGE 12/09/2024 DATED at SHINYANGA this 12th day of September, 2024. 12 S.M. Kulita JUDGE 12/09/2024 13

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