THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. LAND APPLICATION NO. 13 OF 2019.

(Arising in Misc. Land Appeal 15 of 2012, in The High Court of Tanzania, at Mbeya, from Land Appeal No. 66 of 2011, in the District Land and Housing Tribunal of Rungwe, at Tukuyu).

RAYDON KOSSAM MWASONI.....APPLICANT

VERSUS

LIBUKA MWAKISYALA.....RESPONDENT

RULING

23/04 & 20/05/2020.

UTAMWA, J:

This is somewhat a funny matter. The applicant, RAYDON KOSSAM MWASONI applied for the following orders which I list verbatim:

a. To file notice of appeal to the Court of Appeal.
b. To file application for a certificate to appeal to the Court of Appeal.
c. To apply for court proceedings from the Deputy Registrar.
d. Any other order the court may deem just.

The application was pegged on section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (hereinafter called the AJA in short). It was supported by an affidavit sworn by the applicant himself. The respondent, LIBUKA MWAKISYALA resisted the application by filing a counter affidavit sworn by himself.

When the application was called upon for hearing on **20/02/2020**, Mr. Mushokorwa learned counsel for the applicant submitted to the court that, his client had written a letter to the Deputy Registrar applying for withdrawing the application with leave to refile it. The applicant's counsel however, prayed for amending the application instead of withdrawing it. The prayed amendments were aimed at enabling the applicant to attach some necessary documents to the application. Mr. Simon Mwakolo, learned counsel for the respondent did not object to the prayer for amendment.

The court however, sniffed an irregularity in the application. It then inquired into the parties as to whether it was proper for the applicant to embody the prayer marked "c" (To apply for court proceedings from the Deputy Registrar) into this application which is made under section 11 (1) of the AJA. The applicant's counsel promptly prayed to abandon that third prayer so that he could pursue it under a proper law.

On his part, the respondent's counsel resisted the prayed course for abandoning the prayer "c" and proceeding with the application. He thus, proposed that, the applicant should withdraw the application since there were many other irregularities in the application. He pointed out the abnormalities as being the omission to date the affidavit supporting the

application. The other was that, paragraphs 9 and 10 of the affidavit which enveloped sub-paragraphs had not been properly verified.

In his rejoinder submissions, the applicant's counsel reiterated his submissions in chief and prayers. He also relied upon the principle of Overriding Objective. The court then adjourned the matter for a ruling on another date.

On 23/04/2020 when the matter was coming for a ruling (though the court had not recorded it yet), the applicant's counsel changed mind and prayed to withdraw the application so that he could file a proper one. This time, the respondent was advocated for by another counsel, Mr. Aman Mwakolo. This other counsel for the applicant will hereinafter be referred to as Mwakolo Junior to differentiate him from the previously mentioned counsel, Mr. Simon Mwakolo (apparently the two counsel are father and son respectively). Mr. Mwakolo Junior did not resist the applicant's prayer for withdrawing the application. He nevertheless, prayed for costs to the respondent.

The applicant's counsel resisted the respondent's prayer for costs. He proposed that, each party should bear his own costs or the court should order the costs to be in the course. He further contended that, in case the applicant will decide not to re-file the application, then the respondent may approach the court and claim for the same. Mr. Mwakolo Junior did not accept the proposal by the applicant's counsel on the grounds that, the respondent will be unnecessarily tasked to come to court and claim for the costs in case the applicant will refrain from re-filing the application.

Instead, he suggested that, the court should grant costs to the respondent and when the applicant re-files the application, he will be at liberty to apply for the stay of execution of the order for costs.

The court then, inquired into the applicant's counsel on the fate of the submissions and prayers that had been made on 20/04/2020, which said prayers were pending for ruling. Surprisingly, the learned counsel for the applicant changed mind again and lodged an apology for confusing the court. He thus, opted to revert back to the previous prayer for amending the application instead of withdrawing it.

I have considered the arguments by the parties, the record and the law. In my view, parties do not dispute that the application is suffering from the irregularities pointed out by the court and the Mr. Simon Mwakolo, learned counsel on 20/04/2020. The arguments by the parties thus, revolve around the following two germane issues:

i. What is the fate of the application at hand following the irregularities pointed out above?
ii. Which may be the proper order regarding costs under the circumstances of the matter.

As to the first issue, I am settled in mind that, the prayer "c" in the chamber summons could not be made under section 11 (1) of the AJA. According to these provisions, this court's powers are limited only to the extension of time to do the following: for giving notice of intention to appeal to the Court of Appeal of Tanzania (CAT) from its (High Court) judgment/decision, for making an application for leave to appeal to the

CAT and for apply for a certificate that the case is a fit case for appeal: see the decision by the CAT in **Dismas K. B. Francis, t/a K. B Enterprises v. James Joseph Materu and 2 others, Civil Appeal No. 68 of 1999, CAT at Mwanza** (unreported). It was thus, improper, for the applicant to join the prayer "c" in this application without citing the proper section under which it was made.

The prayer "c" thus, suffered the syndrome of non-citation of the enabling law. The law is clear that, non-citation or wrong-citation of the enabling law is fatal to an application, renders it incompetent and erodes the jurisdiction of the court; see **Chama Cha Walimu Tanzania v. The Attorney General, CAT Civil Application No. 151 of 2008, at Dar es Salaam** (unreported) and many others**.** It was also held in this case that, such wrong or non-citation is not a technical matter, but goes to the root of the application.

Again, as rightly contended by Mr. Simon Mwakolo, counsel for the respondent, the affidavit supporting the application is undated at the *jurat* of attestation. It only shows that, it was sworn at Mbeya in February, 2019 without showing any specific date. In the case of **D.B Shapriya Co. Ltd vs. Bush international B.V Civil Application No. 53 of 2012, CAT, at Dar es Salaam** (unreported) the CAT held that, failure to indicate the date and place of oath in the *jurat* of attestation of an affidavit is a fatal blow to an affidavit. It renders it incurably defective and the application incompetent. The rationale behind this rule, I am convinced, is that, affidavits in law take place of oral evidence; see decisions by the CAT in **Phantom Modern Transport (1985) Limited v. D.T Dobie**

(Tanzania) Limited, Civil Reference No. 15 of 2001 and 3 of 2002, CAT at Dar es Salaam (unreported) and **Juma S. Busiyah v. The Zonal Manager, (South) Tanzania Post Corporation, Civil Application No. 8 of 2004, CAT at Mbeya** (unreported). Affidavits must thus, be authentic with specific dates of oath. The affidavit at hand was thus, incurably defective as rightly contended by Mr. Simon Mwakolo, learned counsel for the respondent.

The applicant's counsel tried to hide face under the principle of Overriding Objective. Nevertheless, he did not elaborate the principle and explain as to how it can rescue the application. Certainly, the principle of Overriding Objective has been recently underlined in our law vide see section 6 of the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018 (Act No. 8 of 2018). These provisions amended the Civil Procedure Code, Cap. 33 R. E. 2002 (now Cap. R. E. 2019). The amendments added new sections 3A and 3B to the statute. They essentially require courts to deal with cases justly, speedily and to have regard to substantive justice as opposed to procedural technicalities which are also known as legalism. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported).

However, the principle of Overriding Objective, in my concerted view, did not come to absorb the violation of each and every rule of procedure. It is not thus, a broad-spectrum antidote for every procedural error. That principle cannot, in fact, be applied mechanically to suppress or bulldoze other significant legal principles the purposes of which are also to promote

justice and fair trials. This is the envisaging that was recently articulated by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of Overriding Objective amid a breach of an important rule of procedure.

In my settled opinion, the irregularities discussed above, cannot be cured by resorting to the principle of Overriding Objective. I therefore, find the application at hand incompetent without even considering the other arguments made by the parties. It is our law that, an incompetent matter is a non-existent creature or is nothing before the eyes of the law. For its nothingness, it can neither be amended nor withdrawn nor adjourned. The only legal remedy for a matter of this nature is to strike it out. This is thus, the actual answer to the first issue posed herein above. The application at hand is thus, liable to be struck out.

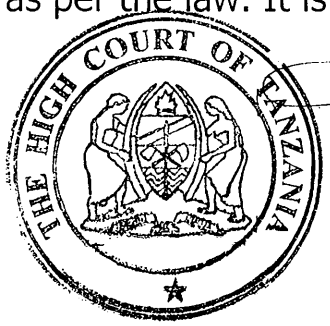
Regarding the second issue on costs, I am of the view that, the law on costs in this land is trite and clear. The general rule guides that, costs are awarded at the judicious discretion of the court. They always follow event, unless the court has good reasons to be recorded, for departing from the general rule; see section 30 of the Civil Procedure Act, Cap. 33 R. E. 2002 (now Cap. 33) as supported by a decision of the CAT in the case of **Njoro Furniture Mart Ltd v. TANESCO [1995] TLR. 205.**

In the case at hand however, it was the court which prompted the parties to address it on the irregularity as shown above. The respondent

then arose and complained on other abnormalities. The respondent did not in fact, raise any preliminary objection before the court prompted the parties. Under such circumstances, I find that, it is just to apportion the costs. For meeting the justice of the case, the applicant is liable to pay to the respondent only 50% (fifty percent) of the costs.

Before I make the concluding orders, I feel indebted to make some remarks for the better legal practice by advocates of this court and subordinate courts thereto. The swerving-syndrome of changing prayers from time to time demonstrated by the applicant's counsel and discussed above was indeed, not compatible with the an apt legal practice in this land. It does not bode any seriousness of a counsel. It may in fact, result to a matter being struck out for abuse of court process in opportune situations. This is because, such inconsistent trend implies lack of diligence on the part of a counsel. It is thus, an expectation of this court that all counsel of this court will avoid such trend.

Owing to the reasons shown above, I hereby make the following orders: the entire application is struck out. The applicant shall pay to the respondent only 50% (fifty percent) of the costs upon the same being taxed as per the law. It is so ordered.



JHK. UTAMWA.
JUDGE

20/05/2020.

20/05/2020.
CORAM; Hon. JHK. Utamwa, J.
Applicant: present in person and Mr. Mushokorwa, advocate.
Respondent; present and Mr. Amani Mwakolo, advocate.
BC; Mr. Patrick Nundwe, RMA.

Court: Ruling delivered in the presence of the parties, Mr. Mushokorwa, learned counsel for the applicant and Mr. Amani Mwakolo, learned advocate for the respondent, in court, this 20th May, 2020.

JHK. UTAMWA.
JUDGE

20/05/2020.