IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

MISC. LAND APPLICATION NO. 38 OF 2022

(Originating from Land Application No. 143 of 2018 of the District Land and Housing Tribunal, at Morogoro)

BETWEEN

ANDREA ADAM MWASELE ....APPLICANT

VERSUS

MAURA GIBLON VICENT (ADMINISTRATRIX OF

ESTATE OF LATE MARTIN KABENGWE).....RESPONDENT

RULING

6th & 20th October, 2022

CHABA, J.

In this application, the applicant is seeking leave to appeal to the Court of Appeal of Tanzania against the decision of this Court. The application is made and taken out under Section 47 (1) of the Land Disputes Courts Act [Cap. 216 R. E, 2019] and it is supported by his affidavit.

On the other hand, the respondent through the legal service of Mr. Francis Mwita, learned counsel, filed a counter affidavit resisting the application. The counter affidavit contained two points of law on preliminary objections which read as follows:

a. That, the application before this honourable court is incompetent and thus unmaintainable for contravening the enabling provisions of the law.

b. That, the affidavit of the applicant contains matter of law contrary to Order XIX, Rule 3 (1) of the Civil Procedure Code [Cap. 33 R. E, 2019].

When the application was called on for hearing, Mr. Richard Gilay, learned counsel entered appearance for the applicant, while Mr. Francis Mwita, learned counsel represented the respondent.

When given the floor to address this court in respect of preliminary objections, Mr. Mwita firstly prayed to abandon the second point and preferred to remain with the first preliminary objection on a point of law.

Arguing in support of the first point of preliminary objection which states that, this application is incompetent for contravening the enabling provision of the law, Mr. Mwita submitted that, in the Chamber Summons, the applicant has cited section 47 (1) of Land Disputes Courts Act [Cap. 216 R. E, 2019] as enabling provisions to move this Court grant the orders sought by the applicant. According to him, the afore-stated provision of the law was deleted and amended under section 9 of the Written Laws (Miscellaneous Amendment), Act No. 8 of 2018. He submitted that currently the proper provision of the law is section 47 (2) of the main Act (Land Disputes Courts Act [Cap. 216 R. E, 2019]).

In amplifying his statement, the learned counsel referred this Court to the case of **China Henan International vs. Salvand Rwegasira,** Civil Reference, No. 22 of 2005, where the Court of Appeal (T) observed that, it is

imperative to cite the correct provisions of the rules. It went on to state that, an error to cite the correct provision is not a technical one but a fundamental matter which goes to the root of the matter. Once the application is based on wrong legal foundation, it is bound to collapse. To reinforce his argument, he cited the case **Adolf George Kweka vs. Julius Elisamehe Mkeni,** Misc. Land Application No. 686 of 2021, High Court (T) - Land Division at page 7, where the court emphasised that, it is a trite law that wrong citation of the enabling or applicable law in moving the court renders the application incompetent and liable to be struck out. The honourable judge in the above case, went on stating:

> "I am aware of the principle of overriding objective which requires the courts to consider substantive justice. However, it is equally settled law that, the principle of overriding objective was not meant to circumvent the mandatory rules of the court or to turn a blind eye on the mandatory provision of the procedural law which goes to the very foundation of the case".

To round up, the learned counsel prayed the court to struck out the application with costs for one reason that the applicant was ready to proceed with the hearing of application without even conceding to the raised preliminary objections on points of law.

In reply, Mr. Richard, learned counsel for the applicant opposed the P.O., and began to submit by citing the case of **Mukisa Biscuits Manufacturing Company vs. West End Distributors LTD (1969) EA 696**, which was cited with approval by this Court in the case of **Harbinder Singh Sethi vs. Republic**, Misc. Economic Case No. 29 of 2017, where the Court observed that a preliminary objection must be able to dispose of the suit. He therefore, contended that section 47 (1) and (2) of the Land Disputes Courts Act (Supra) cited by the applicant is an evidence which is supposed to be ascertained during the hearing of the main application.

As regards to the case of **Adolf George Kweka** (Supra) cited by the learned counsel for the respondent, Mr. Richard submitted that the same is distinguishable in this application because in that case the applicant cited the provisions of section 5 (1) I and 2 I of the Appellate Jurisdiction Act [Cap. 141 R. E, 2019] instead of the provision of Section 47 (3) of the Land Disputes Courts Act. Mr. Richard was of the view that since he cited the correct Act, save for subsections, he prayed the court to consider most substantive justice and not striking out the application. He requested the court issue an order directing the applicant to amend the application so as to expedite the trial of the suit as envisaged by sections 3A and 3B of the Civil Procedure Code [Cap. 33, R. E, 2019] and ensure that justice is not hampered.

In rejoinder, Mr Mwita stressed that, the decision in the case of **China Henan** (Supra) is imperative in the circumstance of this case. He echoed that,

this application is incompetent before this court and that the case of **Adolf George Kweka,** is a good case to bank on. He once again prayed the court to uphold the raised P.O.

I have objectively considered the rival submissions advanced by the parties and the application at hand. The burning issue for determination is whether the point of preliminary objection raised by the respondent's counsel has merit or otherwise.

As gathered from the court record, it is clear that the applicant's application stemmed from a Land matter registered by this court as Land Appeal No. 32 of 2022, which originates from Land Application No. 143 of 2018 at Morogoro District Tribunal. Therefore, no doubt that this court court dealt with the matter while exercising its appellate jurisdiction.

The respondent has raised a point of law contesting that the application is incompetent and thus unmaintainable for contravening the enabling provisions of the law. The respondent's counsel highlighted that instead of citing section 47 (2) of the Land Disputes Courts Act (Supra), he cited section 47 (1) of the Land Disputes Courts Act. In that view, the respondent is of the firm view that this application, as hinted above, is incompetent for citing wrong enabling provision of the law.

Before dealing with the most important point at issue, I had ample time to review the provision of section 47 (2) of the Land Disputes Courts Act [Cap. 216 R. E, 2019]. For ease of reference, it read, and I quote: -

> **"Section 47** (2) – A person who is aggrieved by the decision of the High Court in the exercise of its revisional or **appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal.** [Emphasis is mine].

From the wording of the above provision of the law, no doubt that for a person who is aggrieved by the decision of this Court in the exercise of its appellate jurisdiction may, with the leave of this Court or Court of Appeal lodge his or her appeal to the Court of Appeal. In so doing, it is trite law that a party who cites the provisions of law under the auspices of enabling provision to the intended application or pleadings, he or she must specify by citing exactly the relevant provision or section. In the case of **Theotino Itanisa and Another vs. Pantaleo Kasabira @ Pantaleo Sylvester Rwiza,** Civil Application No. 11 of 2015, (Unreported), citing the case of **Anthony J. Tesha vs. Anitha Tesha,** Civil appeal No. 10 of 2003, (CAT) (Unreported), this court held inter-alia that:

> "This Court has said number of times that wrong citation of enabling provision of law or non citation renders an application incompetent".

Again, in the case of **China Henan International Cooperation Group vs. Salvand K. A. Rwegasira,** Civil Reference No. 22 of 2005 it was held that:

" ... the role of rules of procedure in administration of justice is fundamental as stated by Collins M. R. in Re Coles and Ravenshear (1907) 1 KB. Procedures are intended to be that of hands maids rather than mistresses. That is, their function is to facilitate the administration of justice. Here, the omission in citing the proper provision of the rule relating to a reference and worst still the error inciting a wrong and inapplicable rule in support of the application is not in our view, a technicality falling with in the scope and view of Article 107A (2) (e) of the Constitution it is a matter which goes to the very root of the matter as argued....".

Despite of the above position of the law, still the learned counsel for the applicant is insisting that his client may be allowed to amend his application by inserting the correct enabling provision of the law, of which I am not prepared to entertain.

As to the argument posed by Mr. Richard that this court should generously invoke the overriding objective principle to rescue the application, to be frank, the introduction of the overriding objective principle into our laws through Sections 3A and 3B of the Civil Procedure Code [Cap. 33 R.E, 2019] (the Code) and others, did not replace the duty of the parties, especially the learned counsels, to observe the rules of the game set in the law. Our Apex Court has commented that the overriding objective principle was not meant to be a magic

wand for those who disregard procedural rules. (See: **Njake Enterprises Limited vs. Blue Rock Limited and Another,** Civil Appeal No. 69 of 2017; **District Executive Director Kilwa District Council vs. Begota Engineering Limited,** Civil Appeal No. 37 of 2017 and **Puma Energy Tanzania Limited vs. Ruby Roadways (T) Limited,** Civil Appeal No. 3 of 2018 (All unreported)). In my considered opinion, the contention by the learned counsel for the applicant has a tinny role to play in the circumstance of this case.

That said and done, and to the extent of my findings, I am satisfied that the application before this Court is incompetent for wrong citation of the law and the enabling provision of the law. The preliminary objection on a point of law raised by the respondent's counsel is meritorious, and it drives me to struck out the application with costs. **It is so ordered.**

DATED at **MOROGORO** this 20th day of October, 2022.

THE HIGH COURT OF TANZANIA

M. J. Chaba

Judge

20/10/2022