IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISC. CIVIL APPLICATION NO. 35 OF 2022

(Originating from Judgement and Decree of the High Court of Tanzania at Musoma in Misc. Land Appeal No. 147 of 2020)

VICENT OKWARO ..... APPLICANT

VERSUS

ROBERT ATHANAS ..... RESPONDENT

RULING

04th & 05th May, 2023

M. L. KOMBA, J;

This is a ruling in respect of a preliminary objection raised by the counsel for respondent in regard to certification of the point of law filed under Section 47(2) of the Land Disputes Court Act, Cap 216 (the Act) so that the appeal be preferred. Upon filling of the same, counsel for respondent raised a point of law which pray to be heard on the date scheduled for hearing of Application that;

1. *That this application is incompetent for it being preferred under wrong provision of the law.*
2. *That the application is incompetent for being time barred.*

On 04 May, 2023 the matter was scheduled for hearing, applicant was represented by Mr. Erick Tumaini Korogo while respondent was represented by Mr. Daudi Mahemba both advocates. As the tradition of the court that preliminary Objection should first be entertained first as was in the case of **Khaji Abubakar Athumani vs. Daudi Lyakugile TA D.C Aluminium & Another**, Civil Appeal No. 86 of 2018, CAT at Mwanza, this court allowed counsel for the respondent to submit over the preliminary objection.

Mr. Mahemba submitted that application before this court is incompetent as the court was not properly moved so that it can grant prayers featured in application as the applicant request this court to certify that there is point of law so that he can appeal to Court of Appeal against the High Court decision (Land Application No. 147 of 2020 which was delivered on 27/07/2021). It was his submission that the base of the application is Land Application No. 21 of 2019 which was filed at Busawe Ward Tribunal the appeal no. 75 of 2019 was preferred to District Land and Housing Tribunal for Mara (the DLHT) then High Court application No 147 of 2020 which is the subjection of application before me.

It was his submission that for the matter originating from Ward Tribunal, an application for certification of point of law the procedure is listed under

section 47(3) of the Act but the applicant has moved this court via section 47(2) of the Act which is wrong. He further submitted that wrong citation of the enabling provision affects jurisdiction of the court to grant prayers as prayed. He finally prays this court to dismiss application with costs and abandoned the second point of objection.

Mr. Korogo admitted that the application was filled under S. 47(2) instead of S. 47(3) of the Act and submitted that it was a slip of the pen and pray this court to consider his application so that rights of the parties can be determined. He prayed this court to invoke Overriding Objective as presented under section 3 A of the Civil Procedure Code, Cap 33 (Cap 33) and allow applicant to re-file application. He refers this court to the case of **Alliance Tobacco Tanzania Limited And Another vs. Mwajuma Hamis And Another,** Misc. Civil Application No. 803 of 2018 and beg the court to use wisdom in deciding this matter.

During rejoinder Mr. Mahemba submitted that the two provisions of law serve different purposes and they cannot be merged and insisted that the wrong citation by the applicant is not minor and that section 3A of Cap 33 was not meant to litigants who don't wish to abide to the law and pray the application to be dismissed with costs.

Before I start analysis of issues confronted me, I find it necessary to reproduce the two sections of the Land Disputes Court Act, Cap 216;

> *'47.-(1) A person who is aggrieved by the decision of the High Court in the exercise of its original jurisdiction may appeal to the Court of Appeal in accordance with the provisions of the Appellate Jurisdiction Act.*
>
> *(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.*
>
> *(3) Where an appeal to the Court of Appeal originates from the Ward Tribunal, the appellant shall be required to seek for the Certificate from the High Court certifying that there is point of law involved in the appeal.'*

From the above quotation, certification of point of law is guided by subsection 3. It is a principle of law that wrong citation or failure to cite proper provisions of law it renders the application incompetent. This was held by the Court of Appeal in **China Henan International Co-Operation Group vs. Salvand Rwegasira** [2006] TLR 220.The court had the same view in **Majura Magafu and Peter Swai vs. The Managing Editer, Majira Newspaper and Another**, Civil Application No. 203 of 2013, CAT at DSM (unreported). As well in the case of **Jimmy Lugendo**

vs. CRDB Bank Ltd. Civil, Application No. 171 of 2017, CAT at DSM (unreported). In all these cases the Court of Appeal had the same view that wrong or non-citation renders the application incompetent as the court is not able to grant what is prayed.

As rightly suggested by the Respondent's counsel, Mr. Mahemba that wrong citation of the enabling provision of the law goes to the root of the case, See **Puma Energy Tanzania Limited vs. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of 2008, CAT at DSM (unreported), the same cannot be cured through the principle of overriding objective as submitted by the counsel for applicant.

Let it noted that, introduction of the "Overriding Objective" (oxygen principle) under Section 3 A (1) and (2) of the Civil Procedure Code Cap 33 which was enacted through section 6 of the Written Laws (Miscellaneous Amendments) (Act No. 8 of 2018) ought the courts to rely on substantive justice in making decisions instead of dwelling on technicalities. It enjoins the courts to do away with technicalities, instead they should determine cases justly. However, the principle applies only where the issue does not go to the root of the case.

In the matter at hand, the counsel for applicant's argument does not hold water, as the court cannot act blindly where the provisions of the law clearly stipulate the procedures to be complied with. In some of its cases the Court of Appeal declared this legal position in respect of the extent in which the rule of overriding objective can be invoked, that it should not apply blindly in disregard of the rules of procedure coached in mandatory terms. Some of those cases include **Mondorosi Village Council & 2 Others vs. Tanzania Breweries limited** & 4 Others, Civil Appeal No. 66 of 2017 CAT at Arusha (unreported) in which it was held;

> *'Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case'.*

In a case of **Sgs Societe Generale De Surveilance Sa & Another vs. Vip Engineering & Marketing Ltd & Another**, Civil Appeal No. 124 of 2017 CAT at DSM (page 23) the court had this to say;

> *'The amendment by Act No. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of the court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case.'*

See also **Martin Kumalija & 17 Others vs. Iron & Steel LTD,** Civil Application No. 70/18 of 2018, CAT at DSM (unreported).

For the aforesaid reasons I am convinced and find the Preliminary Objection meritorious, that the application is defective for wrong citation of the enabling provision of the law, hence I struck out with costs.

M. L. KOMBA

Judge

05 May, 2023