IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 272 OF 2020.

(Arising from land appeal No. 115 of 2018 of the High Court land Division, Arising from Land Appeal No. 150 of 2017 of the Kibaha District Land and Housing Tribunal and originating from Kiluvya Ward Tribunal Land Case No. 08 of 2017)

HAMIDU MASOUD PEMBE (Administrator of the Estate of the late **MASOUD PEMBE)** ..... **APPLICANT**

VERSUS

FILOMENA BURA ..... **RESPONDENT**

Date of last Hearing: 29/03/2022

Date of Ruling: 22/04/2022

RULING

I. ARUFAN, J

Before me is an application for the court to certify there is a point of law in Land Appeal No. 115 of 2018 decided by this court which deserve to be considered by the Court of Appeal. The Applicant moved the court under section 48 (2) of the Land Dispute Court Act, Cap 216, [R.E 2019], section 5 (2) (c) of the Appellate Jurisdiction Act, Cap 141, [R.E 2002], Rule 46 (1) of the Tanzania Court of Appeal Rules, 2009, [R.E. 2019] and any other enabling provision of the law. The application is supported by the Affidavit of the applicant and is opposed by the counter affidavit of Nazario Michael Buxay, counsel for the respondent. While the applicant

was unrepresented in the matter the respondent was represented by Mr. Nazario Michael Buxay, learned advocate.

Initially the matter was being presided over by my learned sister Opiyo, J and after being transferred to another station the matter was reassigned to me to continue from where it had reached. When the matter was placed before me for the first time the applicant informed me that, they have already argued the application by way of written submission and what they were waiting for is the ruling of the court. After going through the record of the matter, I didn't manage to see anywhere in the proceedings of the application indicating the parties were required to argue the application by way of written submission.

The court also entertained doubt that it has not been properly moved as the provisions of the law upon which the application is made are not applicable in the matter which the applicant wants to appeal against. After the court entertained the said doubt and after seeing the respondent and her counsel have never appeared in the court for three consecutive days it required the applicant who is always appearing in the court to address it about the said doubt. The applicant being a layperson, had nothing substantial to tell the court about the entertained doubt as he simply prayed the court to assist him so that he appeal to the Court of Appeal against the decision of this court.

It is the finding of this court that, although the applicant is seeking for certification on point of law to be considered by the Court of Appeal as the appeal is originating from the Ward Tribunal but the application is made under section 48 (2) of the Land Disputes Courts Act which simply states the Appellate Jurisdiction Act shall apply to proceedings in the Court of Appeal under section 48 of the cited law. The cited provision of the law does not give the court power to certify the points of law the applicant wants to be certified by this court for consideration by the Court of Appeal. To the view of this court the appropriate provision of the law which was supposed to be invoked in the application is section 47 (3) of the Land Disputes Courts Act and not section 48 (2) of the Land Disputes Courts Act.

The court has also found that, section 5 (2) (c) of the Appellate Jurisdiction Act, cited in the application to move the court to certify there is a point of law worth to be considered by the Court of Appeal is not a correct provision of the law to move the court to issue the sought certificate. The court has arrived to the said finding after seeing the said provision of the law is dealing with appeals governed by Head C of Part III of the Magistrates' Courts Act Cap 11 R.E 2019 which are appeals originating from Primary Courts and not appeals originating from Ward Tribunals.

The above finding of this court is getting support from the Cases of **Marco Kimiri & Another V. Naishoki Eliau Kimiri**, Civil Appeal No. 39 of 2012, CAT at Arusha and **Dorina N. Mkumwa V. Edwin David Hamis**, Civil Appeal No. 53 of 2017, CAT at Mwanza (Both unreported) where when the Court of Appeal was dealing with the issue of applicability of section 5 (2) (c) of the Appellate Jurisdiction Act in an application for certificate on point of law to be considered by the Court of Appeal in the matter originating from Ward Tribunal it stated in the latter case as follows:-

> *"... substantive right to appeal to the Court of Appeal over matters originating from Ward Tribunal cannot be exercised by obtaining certificate under any provision of the AJA."*

Besides, the court has found even Rule 46 (1) of the Court of Appeal Rules cited in the application is not a provision which can move this court to do what the applicant is seeking from the court because the said provision of the law is just giving the procedure as to when the application for certificate on point of law to be considered by the Court of Appeal is supposed to be made. It is stated in the cited rule that the application is supposed to be made after the notice of appeal being lodged in the court. It is not a provision of the law which can move the court to certify a point of law worth to be considered and determined by the Court of Appeal.

From what I have stated hereinabove the court has found the application is made under wrong provisions of the law which cannot move the court to entertain the application filed in this court by the applicant. The effect of making an application under wrong law or provision of the law has been discussed by our courts in number of cases and the stand which has been taken by our courts is that the court cannot entertain an application made under wrong law or provision of the law. That position of the law can be seeing in the cases of **Edward Bachwa & Another V. The Attorney General & Another**, Civil Application No. 128 of 2006, CAT at DSM and **Project Manager ES KO International Inc. Kigoma V. Vicent J. Ndugumbi**, Civil Appeal No. 22 of 2009, CAT at Tabora (Both unreported) where it was held in the latter case that:-

> *"It is now settled law that wrong citation of the law, section, subsection, or paragraphs of the law or non-citation of the law will not move the court to do what is being asked to do and accordingly renders the application incompetent."*

The stated position of the law has been followed by our courts in various decision until when the principle of overriding objective was introduced in the Civil Procedure Code, Cap 33, R.E 2019 by Act No 8 of 2018 (hereinafter referred as the CPC). Now the question is whether under the principle of overriding objective provided under section 3A of

the CPC the court can ignore the said wrong citation of law required to move the court to entertain the application and proceed to entertain the application on the basis that the court has jurisdiction to entertain the application.

The court has found the Court of Appeal stated categorically in the case of **SGS Societe Generale De Surveillance SA & Another Versus V. I. P Engineering and Marketing Limited & Another**, Civil Appeal No. 124 of 2017 that:-

> *"It should be noted that the overriding objective principle was not meant to enable parties to circumvent the mandatory rules of the court to turn blind to the mandatory provisions of the procedural law which goes to the foundation of the case."*

While being guided by the position of the law stated in the above quoted excerpt the court has found that, when this court was dealing with the issue of applying principle of overriding objective in an application where there is wrong citation of the law it stated in the cases of **Antipas Romani Tairo V. Sikudhani Jafari**, Misc. Land Application No. 531 of 2020, HC Land Division at DSM and **Augustino Elias Sokono @ Ubwabwa Ubwabwa & Two Others V. Bilala Seleman**, Land Appeal No. 252 of 2020 HC at DSM (both unreported) that, where the citation of the law in an application is proper and the defect is on provision of the

law upon which the application is made the court can allow the defect to be corrected.

The question is which step the court can take in relation to the defects of wrong citation of the provisions of the law which would have moved the court to entertain the application at hand. The court has found that, as the applicant has cited the Land Disputes Courts Act which is a correct law for moving the court to entertain the application but the error is on the provision of the law which would have moved the court to entertain the application the step which the court can take is to allow the applicant to correct the observed error and refile in the court an application made under the correct provision of the law.

Consequently, the application of the applicant is hereby struck out and the applicant is granted leave to refile in the court an application made under the correct provision of the law. The correct application to be refiled in the court within thirty days from the date of this ruling. As the issue caused the application to be struck out was raised by the court suo moto each party will bear his or her own costs. It is so ordered.

Dated at Dar es Salaam this 22nd day of April, 2022

I. Arufani

JUDGE

22/04/2022

Court:

Ruling delivered today 22nd day of April, 2022 in the presence of the applicant in person and in the absence of the respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

22/04/2022