IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.160 OF 2021

(Arising from Land Appeal No. 30 of 2020 before Hon. Maghimbi, J)

MARIAM KAIJAGE ..... APPLICANT

VERSUS

RHOBI CHACHA ..... RESPONDENT

RULING

Date of last order: 23.08.2021

Date of Ruling: 27.08.2021

A.Z.MGEYEKWA, J

This application is brought under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019]. The applicant seeks leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in Land Appeal No.30 of 2020 delivered on 25th February, 2020. The application is supported by an affidavit deponed by Mariam Kaijage, the applicant. The respondent feverishly opposed the application. In a counter-affidavit sworn by Rhobi Chacha, the respondent. The appeal

has hit a snag. On 15th June, 2021 the respondent lodged a preliminary objection against the appeal which sought to impugn the decision of the tribunal on one point of preliminary objection which read:-

> *"The Application is incurably defective and it should be rejected for contravening the law."*

When the matter was called for hearing before this court on 10th August, 2021. The respondent had the legal service of Mr. Lukumay, learned counsel also hold brief for Mr. Mtaki, learned counsel for the applicant. Mr. Lukumay urged this court to argue the preliminary objection by way of written submission whereas, the respondent's Advocate filed his submission in chief on 13th August, 2021 and the applicant's Advocate filed his reply on 18th August, 2021 and the applicant's Advocate waived his right to file a rejoinder.

As the practice of the Court has it, I had to determine the preliminary objection first before going into the merits or demerits of the application. That is the practice of the Court founded upon prudence which I could not overlook.

In his submission, Mr. Zakayo Lukumay, learned counsel for the respondent started with a brief background of the facts which led to the

instant application which I am not going to reproduce in this application. In his submission, he was brief and focused. The learned counsel for the respondent contended that the application is brought under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] which state that:-

> *"5 (1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal –*
>
> *(c) with the leave of the High Court or of the Court of Appeal against every other decree, order, judgment, decision, or finding of the High Court.*

Mr. Lukumay submitted that section 5 (1) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] is not applicable to land matters. It is applicable in civil matters. He valiantly argued that the application has been preferred as if it is an ordinary civil matter whereas in actual fact it has arisen from a land matter originating from the Land and Housing Tribunal for Ilala. Fortifying his submission he wants this court to draw inspiration from the case of **Dorina N. Mkunwa v Edwin David Hamis**, Civil Appeal No.53 of 2017 (unreported).

It was Mr. Lukumay further submission that the application at hand was required to be preferred under section 47 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. To buttress his position he referred this court to the case of **Kennedy Mhoro v Clementina Komba and Another**, Misc. Land Case Application No. 12 of 2020 delivered by learned brother Hon. Arufani, J. He added that the consequences of non-compliance of the law, the Hon. Judge in the case of **Kennedy Mhoro** (supra) held that:-

> " *The effect of making an application under a wrong section of the law as stated in a number of cases decided by this court and the Court of Appeal is to render the application incompetent."*

The learned counsel for the respondent did not end there, he argued that citing a wrong provision, non-citation of a relevant provision, applying a wrong law amount to a contravention of the law. He lamented that the applicant has not cited a relevant provision and did not apply the correct law. It was his view that this court has not been properly moved to grant the prayers sought in the Chamber Summons and failure to move the court properly rendered the application incompetent. Fortifying his position he cited the case of **Edward Bachwa & Another v the**

Attorney General and Another, Civil Application No. 128 of 2006 CAT at Dar es Salam (unreported).

On the strength of the above submission, Mr. Lukumaye beckoned upon this court to find that the Application is incurably defective for contravening the law. He urged this court to strike out the Application with costs for being incompetent.

In reply, the learned counsel for the applicant also started narrating a brief background of the facts which led to the instant application which I am not going to reproduce in this application.

The learned counsel for the applicant strongly opposed the learned counsel for the respondent submission. He contended that in the case of Dorin (supra) section 5 (1) (c) of the Appellate Jurisdiction Act is inapplicable to land disputes originating from Ward Tribunal. He added that the instant matter originated from the District Land and Housing Tribunal for Ilala. For that reason, he invited this court to find and hold that the preliminary objection is irrelevant to the Application and ought to be ignored.

Mr. Mtaki argued that failure to cite a proper provision of law cannot be a ground for defeating the applicant's Application. He added that the remedy is not to strike out the Application but to order the Applicant to

file an amended application. To bolster his position he cited the case of **Dangote Cement Limited v NSK Oil and Gas Limited**, Commercial Application No. 8 of 2020 HC (unreported). He went on to state that this court has power to deal with this matter in controversy so far as regards the right and interests of the parties. He stated that the respondent's objection is not meritorious and ought to be dismissed with costs. He added that with the advent of the principle of overriding objective brought by the Written Laws (Miscellaneous Amendment) No.3 Act, 2018 (Act No.8 of 2018) courts are now required to deal with cases justly, and to have regard to substantive justice without over-relying on procedural technicalities. To buttress his position he referred this court to the case **Yokobo Magoiga Chichere v Peninah Yusuph**, Civil Appeal No.55 of 2017 (unreported).

Having so submitted against the preliminary objection, Mr. Mtaki, learned counsel for the applicant prayed this court to dismiss the point of preliminary objection raised by the respondent's Advocate.

I have given careful deliberation to the arguments for and against the preliminary objection herein advanced by both learned counsels. Having done so, it should be now opportune to determine the preliminary

objection raised by the respondent's Advocate and the main issue for determination is ***whether the preliminary objection is meritorious.***

Without wasting the time of this court from the outset I have to state that I fully subscribe to the respondent's Advocate submission that the application is brought under a wrong provision of the law. The proper legislation in land matter to move this court to grant the application for leave to appeal to the Court of Appeal of Tanzania is the Land Disputes Courts Act, Cap. 216 [R.E 2019].

In an application for leave to appeal in land matters, section 47 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] is a proper provision to move this court to determine an application for leave to appeal to the Court of Appeal of Tanzania from a decision that originated from the District Land and Housing Tribunal. For ease of reference, I find it apposite to reproduce the said section as hereunder:-

> "*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."

The cited section 5 (1) of the Appellate Jurisdiction Act, Cap. 141 is a proper provision to move a court to grant leave in regard to civil matters.

Having said so there is no any provision cited by the learned counsel for the applicant to move this court to grant the applicant's application. The learned counsel for the applicant has opposed the preliminary objection and ended up requesting this court to apply overriding principles not to base on procedural technicalities.

The learned counsel for the applicant submitted that failure to cite a proper provision of law cannot be a ground for defeating the applicant's application. It is my view, that this position of the learned counsel for the applicant would be proper contingent upon the applicant's Advocate citing a proper section to move the court to grant his application. However, reading the applicant's Advocate submission, there is nowhere the learned counsel for the applicant cited a proper provision which he thinks is a proper citation to move this court to determine the instant application. It is noteworthy that the court should confine its decision to the prayer made by the party. It cannot go beyond what is not asked to do. The same was observed in the case of **Marie-Claire Lesperance v Jeffrey Larue**, Civil Appeal SCA15/2015, the Court of Appeal of Seychelles. Having said so, it is my respectful view that this court cannot apply the overriding principle since the applicant's Advocate did not move this court with a proper citation to determine the applicant's application.

For the above reasons, I sustain the preliminary objection that this court was not moved to grant the applicant's application. I therefore strike out the application for being brought under a wrong provision of the law with costs.

Order accordingly.

Dated at Dar es Salaam this date 27th August, 2021.

A.Z. MGEYEKWA

JUDGE

27.08.2020

Ruling delivered on 27th August, 2021 in the presence of Mr. Lukumay, learned counsel for the respondent.

A.Z. MGEYEKWA

JUDGE

27.08.2020