IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 252 OF 2020

(Arising from Misc. Land Application No. 869 of 2019 from the District Land and Housing Tribunal for Kinondoni at Mwananyamala)

1. **AUGUSTINO ELIAS SOKOMO**
   @ AUGUSTINO UBWABWA UBWABWA ..... 1ST APPELLANT
2. **AGNES MGUNDA @ MRS. MCHANGO**
   @ AGNES MGUNDA ..... 2ND APPELLANT
3. **PASCAL SEBASTIAN MILINGA ..... 3RD APPELLANT**

VERSUS

BILALA SELEMAN SEIF ..... RESPONDENT

JUDGMENT

Date of Last order: 28.01.2022

Date of Judgment: 31.01.2022

A.Z.MGEYEKWA, J

This is the first appeal emanating from the District Land and Housing Tribunal for Kinodoni at Mwanyamala. The matter of controversy between

the parties to this appeal is on the ownership of land. The material background facts to the dispute are not difficult to comprehend. They go thus: the appellants lodged an Application before the District Land and Housing Tribunal for Kinondoni at Mwanyamala praying the tribunal to set aside the *exparte* judgment in respect to Application No.55 of 2008 dated 6th August, 2009. Before hearing the Application on merit, the tribunal determined the preliminary objections raised by the respondent that the tribunal has not been properly moved by the appellants and that the Application is grossly misconceived and bad in law. The tribunal determined the preliminary objection and decided to uphold the preliminary objections raised by the respondent as a result the appellants' Application was struck out with costs.

Believing the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala was not correct, the appellant lodged a petition of appeal containing three grounds of appeal as follows:-

1. *That, the Honourable Chairman grossly misdirected himself in law in making a distinction between the words citing the wrong provision and*

citing the wrong law in consequence whereof striking out the appellants' Misc. Application No/ 869 of 2019.

2. *That having regard to the nature of the application and the circumstances of the application, the Honourable Chairman grossly misdirected himself in fact and in law in failing to consider the application on merits whereas the District Land and Housing Tribunal had jurisdiction to hear and determine the application.*
3. *That, the Honourable Chairman grossly misdirected himself in fact and in law, in failing to apply the principles of overriding objectives when considering the objections raised by the respondent.*

When the matter was called for hearing before this court on 25th November, 2021, the 1st appellant and the respondent appeared in person, unrepresented. Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court whereas, the appellants Advocate filed a joined submission in chief on 15th December, 2021 and the respondent's Advocate filed his reply on 13th January, 2022 and the appellant's Advocate waived his right to file a rejoinder.

Mr. Rweyongeza, learned counsel for the appellant in his written submission, on his first ground, he stated that there plain meaning of the words "citing the wrong provision" means citing a wrong section or subsection of the provision of the relevant law which the person intents to use on a particular matter whereas "citing a wrong law" means citing or using irrelevant law on a particular matter by a person intends to move the Court. He went on to submit that at the trial tribunal the appellant moved the tribunal under provisions of Regulation 11 (2) Regulations GN No.174 of 2003 under Part IV of the Regulation which state as follows:-

> *" Rule 2 (2) A party to an application may, where he is dissatisfied with the decision of the tribunal under sub-regulation (1) with 30 days apply to have the order set aside and the Tribunal may set aside its order if it thinks fit so to do and in case of refusal appeal to the High Court."*

The learned counsel for the appellant argued that the Chairman in his Ruling specifically on pages 10 -15 stated that the proper provision of the law ought to have been Order IX Rule 12 (1) of the Civil Procedure Code Cao.33 which reads together with section 51 (2) of the Land Disputes

Courts Act as amended. To support his submission he cited the case of **Abubakar Mohamed Klenda v Juma Mfaume** (1989) TLR this court held that:-

> *"Omission to cite a proper provision of the law in chamber summons is not fatal to the application."*

The learned counsel for the appellant went on to submit that the requirement of citing a provision of the law was developed through case law, by the Court of Appeal, and all subordinate courts were bound by the decision of the Court of Appeal. He referred this court to the amended Rule 48 (1) of GN. 362 of 2017 and stated that the omission referred to missing to cite any provision of the law or citing a wrong provision of the law. He blamed the Chairman's decision, saying that the difference between citing a wrong provision of the law and citing the wrong law. He added that the tribunal relied on several cases in making its decision which was made before the amendment. He cited the case of **Citi Bank Tanzania Ltd v TCC Ltd & 4 Others**, Civil Application No.64 of 2003.

Submitting on the second ground, the learned counsel stated that the Chairman misdirected himself in fact and law in failing to consider the application on merits. He lamented that the High Court decisions are binding. Fortifying his position, he referred this court to the case of **Alliance One Tobacco Tanzania Limited & another v Mwajuma Hamis (as the administratrix of the Estate of Philemoni R. Kilenyi & another**, Misc. Civil Application No. 803 of 2018, whereas this court declined to dismiss the application for the wrong citation of the law where the court has jurisdiction to determine the matter.

As to the last ground, the appellant's Advocate contended that insisting he submitted that the position in citing the wrong citation of the law has been changed since the Court of Appeal of Tanzania has introduced a provision on overriding objectives which came with the enactment of section 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] and the same have been incorporated in the Civil Procedure Code Cap.33. He continued to submit that the procedure at the District Land and Housing Tribunal is governed by the Land Disputes Courts (The District Land and Housing Tribunal) Regulations

of 2003. He added that there is a room under section 51 (2) of the Land Disputes Courts Act, Cap. 216 to take care of inadequacy.

The learned counsel for the appellant continued to submit that the Regulation does not have within its provisions a place for overriding objectives to cater for the administration of justice. He added that the tribunal had to take recourse to the Civil Procedure Code Cap.33. To support his submission he cited the case of **Dotto Hamza Mwinyimvua v Mohamed Hassan Mtonga**, Misc. Land Application No. 54 of 2020 at HC Land Division. Stressing, the learned counsel for the appellant submitted that the spirit v=bought about by overriding objectives guides not only the Court but also the parties and their Advocates he claimed that the tribunal did not observe the requirement of the law stipulated under section 3B(2) of the Civil Procedure Code Cap.33.

In conclusion, the learned counsel for the appellant urged this court to allow the appeal and quash and set aside the decision of the District Land and Housing Tribunal for Kinondoni at Mwanyamala in Misc. Land Application No. 869 of 2019 with costs.

Opposing the appeal, the learned counsel for the respondent from the outset submitted that the appeal is demerit. In his submission, Mr. Lucas, 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. He went on to argue that the appellant not only cited a wrong citation of the law but also a wrong law altogether in moving the trial Tribunal. He also potted to argue the first, fourth, and fifth grounds separately. He stated that the appellant lodged his application at the District Land and Housing Tribunal under Regulation 11 (2) of GN No.174 of 2003 seeking an order to set aside the *exparte* judgment entered by the trial Tribunal. Mr. Lucas went on to state that the appellants' application is not supported or governed by Regulation 11 (2) of GN No.174 of 2003 which state that:-

" 11 (2) A party to an application may, where he is dissatisfied with the decision of the Tribunal under sub-regulation (1), within 30 days apply to have the orders set aside, and the Tribunal may set aside its orders if it thinks fit so to do and in case of refusal appeal to the High Court."

He also cited Regulation 11 (1) of GN No.174 of 2003. It was his submission that guided by the above provisions, the appellant cannot invoke the provisions of Regulation 11 (2) of GN No.174 of 2003 to move the trial tribunal to set aside its *ex parte* judgment in Land Application No.55 of 2008. He added that the appellants were absent when it was heard and determined *ex parte*. He referred this court to the appellants' affidavit and argued that it is clear that the appellants were served with notice of hearing of the application and were absent when the hearing date was fixed by the tribunal.

Mr. Lucas further submitted that since there is no provision in the Land Disputes Courts Act, Cap. 216 and GN No. 174 of 2003 which govern an application to set aside *ex parte* decision which was passed by the trial tribunal while the applicant was absent on the date fixed for hearing of the application on the ground that they were not duly served. He added that the appellants were required to cite Order IX Rule 13 (1) of the Civil Procedure Code. To buttress his submission he referred this court to the cases of **Mwita Construction Company v Tanzania Harbours Authority** [2006] TLR 22, **Almas Iddi Mwinyi v National Bank of**

Commerce and another [2001] TLR 220, **Mbeya Rukwa Autoparts and Transport Ltd v Jestina George Mwakyoma** [2003] TLR 252 and **Maneno S/O Abdallah v The Republic**, Criminal Application No.2 of 2005, Court of Appeal of Tanzania at Mwanza. He added that according to the doctrine of stare decisis the above legal principles established by the Court of Appeal of Tanzania are binding.

Concerning Rule 48 (1) of the Court of Appeal Rules of 2009, the learned counsel for the respondent contended that he stated that it is mandatory for the appellants to cite the correct enabling law that gives the court jurisdiction to grant the order sought. He referred this court to the case of **Alliance One Tabacco** (supra) and **Antipus Romani Tairo v Sikudhani Jafari**, Misc. Land Application No. 531 of 2020, HC (Land Division) at Dar es Salaam.

With respect to overriding objectives, Mr. Lucas submitted that the overriding principle does not save an incompetent application. He cited the case of **Stanely Ng'ethe Kinyanjui v Tony Ketter & 2 others** [2015] eKLR. He valiantly argued that the overriding objective principle was not

introduced to disestablish well-settled judicial proceedings. He firmly argued that the appellants' application at the tribunal was incompetent and cannot be saved by the principle of the overriding objective since the appellants not only cited a wrong provision of the law but also a wrong law. He distinguished the coted case of **Dotto Hamza Mwinyijuma** (supra) since the appellant cited a wrong provision of the law and wrong law altogether.

Mr. Lucas continued to submit that the overriding objective principle does not apply to errors/mistakes which go to the matter. To bolster his submission he cited Article 107A (2) (e) of the United Republic of Tanzania Constitution, 1977 which obliges the courts to dispense justice without being tied up with technicalities provisions that may abstract dispensation of justice.

Mr. Lucas did not end there, he submitted that litigation must come to an end, he stated that it was the third time for the appellants to file incompetent applications before the tribunal. He stated that the first application Misc. Application No.125 of 2018 was incompetent and it was struck out and the appellants were given leave to file a competent

application. He went on to submit that the appellants filed a Misc. Application No.383 of 2019 and the same was struck out.

On the strength of the above submission, the respondent's Advocate beckoned upon this court to dismiss the appeal with costs.

Having summarized the submissions and arguments by both learned counsels, I am now in the position to determine the grounds of appeal before me. In my determination, I will consolidate all three-second grounds because they are intertwined.

The raised grounds are related to a wrong citation of the law and overriding principles. Mr. Richard is relying on overriding objectives, introduced by the Written Laws (Miscellaneous Amendments) (No.3) Act, No. 8 of 2018 are sections 3A and 3B of the AJA which provide as follows:

" 3A (1) The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate, and affordable resolution of all matters governed by this Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it with a view to attaining the following-

(a) Just determination of the proceedings;

(b) Efficient use of the available judicial and administrative resources including the use of suitable technology; and

(c) Timely disposal of the proceedings in the Court at a cost affordable by the respective parties.

I am in accord with the submission of the learned counsel for the appellant that the practice is encouraged after the enactment of section 3A via Written Laws (Miscellaneous Amendment) Act, No. 3 of 2018 which adjusted the Code to introduce the principle of overriding principle. The principle is supported with the provisions in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania on the right to be heard.

As well as Article 107A (2) (e) of the Constitution of the United Republic of Tanzania on disregarding legal technicalities and precedent in **Yakobo Magoiga Gichere v Peninah Yusuph**, Civil Appeal No. 55 of 2017. However, I hesitate to subscribe to the appellant's Advocate contentions on this grounds since the applicability of the overriding objective principle, needs to be applied with reasons and without offending clear provisions of the law.

The overriding objectives principle has been tested in Court on numerous occasions, such as in the case of **Njake Enterprises Ltd v Blue Rock Ltd**, Civil Application No. 69 of 2017 (unreported). In yet another case of **Martin D. Kumalija & 117 Others v Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 (unreported). Sections 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 introduced recently vide the Written Laws (Miscellaneous Amendments) (No.3) Act No. 8 of 2018 to give effect to the overriding objective of facilitating the just, expeditious proportionate, and affordable resolution of disputes. This principle is a vehicle for the attainment of substantive justice, it will not

help a party to circumvent the mandatory rules of the Court. However, the same must be raised at the proper forum.

In the circumstance of the appeal, the application at the District Land and Housing Tribunal, the appellants lodged an application under a wrong citation of provision of the law and wrong citation of the law. In my considered view, the tribunal was not moved to determine the application since the whole citation was improper. Had it been that the citation of the law was proper, then I would join hands with the submission made by Mr. Richard that the same could have been corrected and the tribunal could proceed to determine the application. However, since the citation of the law was improper, the same is equal to none-citation of the law. Therefore, it is obvious that the application was incompetent before the tribunal. I subscribe to the submission made by the learned counsel for the respondent that non-citation of the relevant law is a fatal omission that renders the application incompetent.

Again, the omission in citing the proper law relating to the prayers of the appellants stated in their chamber summons is not in my view, a technicality falling within the scope and purview of Article 107A (2),(e) of

the Constitution of the United Republic of Tanzania. It is a matter which goes to the root of the matter. See the cases of **Mwita Construction Company** (supra) and **Maneno S/O Abdallah** (supra).

The above finding sufficiently disposes of the appeal. That said and done, I proceed to dismiss the appeal with costs.

Order accordingly.

Dated at Dar es Salaam this date 31st January, 2022.

A.Z.MGEYEKWA
JUDGE
31.01.2022

Judgment delivered on 31st January, 2022 in the presence of Mr. Lucas Kamanija, learned counsel for the respondent in the absence of the appellant.

A.Z.MGEYEKWA
JUDGE
31.01.2022

Right of Appeal fully explained.