

**IN THE HIGH COURT OF TANZANIA**  
**DAR ES SALAAM DISTRICT REGISTRY**  
**AT DAR ES SALAAM**  
**MISC. CIVIL APPLICATION NO. 196 OF 2019**  
*(Arising from Civil Case No. 150 of 2019)*

**AMIN NATHANIEL**  
**MCHARO.....APPLICANT/DECREE HOLDER**

**VERSUS**

**TANZANIA ELECTRIC**  
**SUPPLY LIMITED.....RESPONDENT/ JUDGMENT DEBTOR**

**RULING**

*Date of Last Order: 9/7/2021*

*Date of Ruling: 18/03/2022*

**S.M. KULITA J;**

In this application the Applicant prays for this court to issue an order for arrest and detention, as a Civil Prisoner, the Managing Director of the Respondent in execution of a court decree in Civil Case No. 150 of 2014, issued by this court on 13<sup>th</sup> December, 2016.

In his reply thereto Counsel for the Respondent raised Preliminary Objection that this court has not been properly moved as the cited

enabling provision of the law does not provide the order which has been sought by the Applicant.

The Preliminary Objection was argued by way of written submissions. While the Applicant is represented by Mr. Makanja Manono and Mr. David Shadrack Pongolela Advocates from Luno Law Chambers, the Respondent is represented by Mr. Laurian Hakim Kyarukuka, Advocate and Legal Principle Officer from Legal Department TANESCO LTD. Headquarters.

In his written submission in support of the Preliminary Objection Advocate for the Respondent, Mr. Laurian Hakim Kyarukuka submitted that the Applicant has moved the court through a wrong provision of the law. He said that the Applicant's counsel moved the court by citing O. XXI, R. 9 of the Civil Procedure Code [Cap 33 RE 2002] while the proper provision is O. XXI, R. 35(1).

Mr. Kyarukuka submitted that the remedy for wrong citation is the struck out of the matter with costs. To support his argument he cited the case of **JIMMY LUGENDO V. CRDB BANK LTD. Civil Application No. 171 of 2017, CAT at DSM (unreported)**.

The Respondent's Counsel also submitted that the said fault cannot be cured through the principle of overriding objective as wrong citation of the enabling provision of the law goes to the root of the

procedural law. He cited the case of **PUMA ENERGY TANZANIA LIMITED V. RUBY ROADWAYS (T) LIMITED, Civil Appeal No. 3 of 2008, CAT at DSM (unreported)** to strengthen what he asserts.

He concluded by praying the court to struck out the application with costs.

In his reply thereto the Applicant's Counsel Mr. David Shadrack Pongolela submitted that it was not wrong for the applicant (Decree Holder) to cite O. XXI, R. 9 of the Civil Procedure Code as it vests the court with powers to execute its decree. It is therefore a proper cited provision. He said that the said provision is coached in generality. It is then upon the Decree Holder to choose which mode he wishes to use in executing the said decree. In the application at hand the applicant has opted the decree to be executed by the mode of Arrest and Detention of the Judgment Debtor.

As for the provision of O. XXI, R. 35(1) the Applicant's Counsel submitted that it is just directive and procedural, hence cannot stand as enabling provision for this court to grant the application. He further submitted that, in alternative, if the court finds that the Preliminary Objection has merit, he invite this court to abide with

the decision of this court in **DANGOTE CEMENT LIMITED V. NSK OIL GAS LIMITED, Misc. Civil Appeal No. 8 of 2020** while quoting for approval the persuasive decision of the same court in **ALLIANCE TOBACCO TANZANIA LIMITED AND ANOTHER V. MWAJUMA HAMIS AND ANOTHER, Misc. Civil Application No. 803 of 2018** that technicalities should not hinder dispense of justice.

The Applicant's Counsel invites this court to dismiss the Preliminary Objection with costs.

From the aforesaid submissions this court has the following observations; what I can grasp from the submission of the Applicant's counsel is that he admits to have not cited O. XXI, R. 35(1) of the Civil Procedure Code, and that is what the chamber summons transpires.

It is the submission of Applicant's Counsel, Mr. David Shadrack Pongolela that it was not wrong for the applicant (Decree Holder) to cite O. XXI, R. 9 of the Civil Procedure Code as it vests the court with powers to execute its decree. I agree with the counsel on that but it was also mandatory for the applicant to cite the enabling provision as well which is O. XXI, R. 35(1) of the Civil Procedure Code though Mr. Pongolela submits that it is not the enabling

provision, but directive and procedural. The question is, **what is the enabling provision?** It is a section/provision of the law that gives someone legal authority to do something. In law, anything is done upon the presence of the law that enables the said act to be done and the mode of doing that said act should be subject to the directives and procedures that have been enacted for. The **enabling provision** is that which allows the applicant to make the application he has made or he intends to make. The **procedural provision** is the section which provides the mode/procedure in which the application should be made. In making citation not only the procedural provision but also the enabling provision of the law should also be cited.

The only provision cited by the Applicant (Decree Holder) is **O. XXI, R. 9** which provides the **procedural means** which the Decree Holder has to follow/do in order to execute his decree. It provides the general rule for filing application for execution of decree. The said provision states;

*"When the holder of a decree desires to execute it, he shall apply to the court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions herein before contained to another court then to such court or to the proper officer thereof"*

As rightly submitted by the Respondent's Counsel that apart from the said provision the Applicant ought to have cited **O. XXI, R.35** which is the **enabling provision** permitting the judgment debtor to show cause against detention in prison. The provision states;

*"(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention as a civil prisoner of a judgment debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.*

*(2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment debtor"*

This provision provides for the mode of execution that the Applicant intends to apply, being the detention of the Judgment Debtor as a Civil Prisoner whose enabling provision is the said **O. XXI, R. 35 of the Civil Procedure Code**. Unfortunately this provision has not been cited by the Applicant in his application. That is fatal. Such

defect renders the application incompetent, hence liable to be struck out.

The Applicant's counsel tried to hide the applicant under the umbrella of *Overriding Objective* principle when he cited the case of **DANGOTE CEMENT LIMITED V. NSK OIL GAS LIMITED (supra)** in which the case of **ALLIANCE TOBACCO TANZANIA LIMITED AND ANOTHER V. MWAJUMA HAMIS AND ANOTHER (supra)** was quoted, that technicalities should not hinder dispense of justice.

It is a principle of law that wrong citation or failure to cite it renders the application incompetent. This was held by the Court of Appeal in **CHINA HENAN INTERNATIONAL CO-OPERATION GROUP V. SALVAND RWEASIRA [2006] TLR 220**. The court had the same view in **MAJURA MAGAFU AND PETER SWAI V. THE MANAGING EDITOR, MAJIRA NEWSPAPER AND ANOTHER, Civil Application No. 203 of 2013, CAT at DSM (unreported)**. As well in the case of **JIMMY LUGENDO V. CRDB BANK LTD. Civil Application No. 171 of 2017, CAT at DSM (unreported)** which was cited by the Respondent's Counsel the Court of Appeal had the same view that wrong or non-citation renders the application incompetent.

As rightly suggested by the Respondent's counsel, Mr. Kyarukuka while citing the case of **PUMA ENERGY TANZANIA LIMITED V. RUBY ROADWAYS (T) LIMITED, Civil Appeal No. 3 of 2008, CAT at DSM (unreported)** that wrong citation of the enabling provision of the law goes to the root of the case, hence cannot be cured through the principle of *overriding objective*.

Be it noted that introduction of the "*Overriding Objective*" (*oxygen principle*) under **Section 3A(1) and (2) of the Civil Procedure Code** 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.

On this, the 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 V. 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 V. 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."*

The Court of Appeal had the same view in **MARTIN KUMALIJA & 17 OTHERS V. IRON & STEEL LTD, Civil Application No. 70/18 of 2018, CAT at DSM (unreported)** that the principle of *overriding objective* does not apply where the fault touches the root of the case.

In upshot I find the Preliminary Objection meritorious, that the application is defective for non-citation of the enabling provision of the law, hence struck out with costs.



**S.M. KULITA**

**JUDGE**

**18/03/2022**

