IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

PC CIVIL APPEAL NO 2502 OF 2024

(Arising from the decision of District Court of Bahi, Miscellaneous Civil Application No.3/2023 dated 8th September 2023; original matrimonial Cause No. 4 of 2023 in the Primary Court of Bahi District at Kigwe date 19th May 2023)

HASSAN JUMA .....APPELLANT

VERSUS

HINDU PASTORY MALODA.....RESPONDENT

JUDGMENT

Date of last order:

Date of the judgment: 23/04/2024

LONGOPA, J.:

The parties were parties before the Bahi Primary Court at Kigwe which decided against the appellant herein. The appellant challenged the decision at Bahi District Court where the matter was dismissed for want of prosecution after failure of the appellant to enter appearance on hearing date. The appellant determined to challenge this decision to dismiss the case for want of prosecution, he initiated an application to set aside the dismissal order. He cited a section and law that do not apply to the

proceedings related to matters, namely Order IX Rule 3 of the Civil Procedure Code, Cap 33 R.E. 2019.

The appellant being dissatisfied by the decision of the Bahi District Court, the appellant herein appealed on two grounds of appeal, namely:

1. *That the trial court erred in law and in fact by striking out the application while the same was well placed before the Court; and*
2. *That the trial Court erred in law and in fact by striking entire application while the same had good cause to warrant the court intervention.*

The parties argued this appeal by way of written submission. The appellant was the first to file his submissions. It was submitted that this is a purely matrimonial matter that commenced in the Primary Court of Kigwe and appealed to the District Court of Bahi which dismissed the appeal for want of prosecution. The appellant filed an application for setting aside the dismissal order which was also struck out for wrong citation of enabling provision of the law hence this appeal.

It was submitted by the appellant that it was quite true that the District Court was not properly moved since the appellant/ applicant cited Order IX Rule 3 of the Civil Procedure Code which is inapplicable in the circumstances of the case. However, the District Court ought to have

applied the gist of Article 107A (2) (e) of the Constitution of the United Republic of Tanzania as amended from time to time that courts should not be bound by technicalities in administration of justice.

According to the appellant, this provision of the Constitution upholds the overriding objective principle and that courts are urged to focus on substantive justice at the expense of technicalities. It was reiterated that objective principle or oxygen principle requires courts to deal with cases justly and to have regard to substantive justice.

It was appellant's version of submission that though the District Court of Bahi was wrongly moved by the wrong citation, the same did not prejudice the respondent and equally it would not occasion failure of justice. This is the non-citation of enabling provision is purely procedural and is regulated by the rules of procedure and practice. He cited the case of **Re Coles &Ravenshear** [1907] 1 KB 14, Collin M.R (as he then was once observed that: the relation of the rules of practice to work of justice is intended to be that handmaid rather that mistress.

The appellant invited this Court to disregard the decision cited by the district magistrate in the case of **Raydon Kossam Mwason versus Libuka Mwakisyala**, Misc Land Application No 13/2019 High Court of Tanzania at Mbeya (Unreported) as it is distinguishable to the circumstances of the case because it decision was delivered long time ago

before the inception of oxygen principles or overriding objective to the administration of justice.

The appellant reiterated that this matter being a matrimonial and the appellant is still dissatisfied as the appellant remained unheard it may erode the family relationship which the district court was invited to come to its aid.

In response, the respondent submitted that the District Court was correct to hold that the appeal should be dismissed for want of prosecution and its subsequent application for setting aside the dismissal order lacked merits.

On the first ground, it was reiterated shortly by the respondent that it is true that the District Court of Bahi was not properly moved as the appellant cited Order IX Rule 3 of the Civil Procedural Code, Cap 33 R.E. 2019 which is not applicable in the circumstances.

The respondent cited the case of **Severine A. Mallya and another versus Charles William (legal representative of the Late Kichao)** where the Court observed that: based on the above decisions, the circumstances in this case does not attract the invocation of the overriding objective principle. The error encountered is that which renders the application to be improper before this Court.

In the case of **Mondorosi Village Council and 2 Others vs Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017, CAT Arusha (Unreported) where it was held that: Regarding 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.

It was the respondent's view that gist of Article 107A (2) (e) of the Constitution of the United Republic of Tanzania was not applicable as the appellant misused it for there was a required provision of law which ought to have been used to properly move the Court. It was reiterated that this appeal should be dismissed for lack of merits.

Upon considering the rival submission by the parties and peruse of the record of the District Court of Bahi, this Court is enjoined to determine whether the appeal has any merits.

There is no dispute that appellant did not properly move the Court in an application for setting aside the dismissal order. There are two schools of thought on this aspect. The first school is that failure to cite proper provision by not citing a specific subsection does not make the application incompetent.

In the case of **Diocles Kamuhabwa vs Theonest Kamuhabwa** (Civil Appeal No. 436 of 2022) [2024] TZCA 221 (22 March 2024), at page 5 CAT stated that:

> *It is true that the appellant has cited rule 95 (5) and 96 (5) of the Rules as enabling provisions in the certificates of correctness of the record in the original and supplementary record of appeal respectively. Nevertheless, the law is now settled that citing a wrong provision is curable and does not render the record of appeal incompetent. On that account, we are of the firm view that the raised concerns are minor and do not go to the root of the matter. As such, neither of them renders the appeal incompetent. We accordingly overrule the same.*

Further, in **Joseph Shumbusho vs Mary Grace Tigerwa & Others** (Civil Appeal 183 of 2016) [2020] TZCA 1803 (6 October 2020), pages 15-16, the Court of Appeal had stated that:

> *Given the fact that the respondents had cited section 49 of the Probate and Administration Act which deals with revocation and removal of the administrator the citation of the inapplicable provision of the law did not make the respondents' application incompetent. Admittedly, the respondents did not go further to mention the specific*

subsection that was applicable. But, as rightly submitted by the learned counsel for the respondents, ***the failure to cite specific subsection of the law did not make the application incompetent.***

The second school of thought is that wrong citation is fatal. In **Chama Cha Walimu Tanzania vs Attorney General** (Civil Application 151 of 2008) [2008] TZCA 12 (11 November 2008), at pages 18-19 & 24, the Court of Appeal of Tanzania observed that:

It may also be worthwhile pointing out here that the gravity of the erroring omitting either cite enabling provision or citing a wrong one was succinctly stated in the case of ***China Henan International Cooperation vs Salvand K.A. Rwegasira****, Civil Application No. 22 of 2005 (Unreported). The Court said that: here* ***the omission of citing the proper provision of the rule relating to a reference and worse still the error of citing a wrong or inapplicable rule in support of the application is not in our view, technicality falling within a purview of Article 107A (2) (e) of the Constitution. It is a matter which goes to the very root of the matter. We reject (the) contention that the error was technical.***

As the learned trial judge was enjoined by law to strike out the respondent's incompetent application and did not do so, it now falls within our jurisdiction to do what it failed to do. This will not be the first time the Court is doing so. It has thus intervened in the past.

Failure to cite the relevant law governing the procedural aspect is not always served with the overriding objective principle. A case of **Prosper Ladslaus Lyarua vs Leonard Sabuni & Another** (Civil Appeal No. 91 of 2021) [2024] TZCA 180 (15 March 2024) is illustrative on this aspect. At page 8, the Court of Appeal stated that:

Borrowing a leaf from our decision in North Mara Gold Mine Limited v. Sinda Nyamboge Ntora, [2022] TZCA 258, [9 May, 2022] we are of the view that, timeliness of the appeal is a fundamental issue that cannot be skated over as a mere technicality which is curable by the overriding objective principle as impressed on us by the learned counsel for the appellant.

In any application that invokes the discretionary powers of the Court, the applicant must demonstrate that there is sufficient cause or good cause for exercising such powers. In the case of **Henry Jalison Mwamlima vs Robert Jalison Mwamlima & Others** (Civil Application No. 652/06 of 2022) [2023] TZCA 17949 (13 December 2023), the Court of Appeal reiterated that:

> *As to what exactly constitutes "good cause" has been left to the discretion of the Court. Essentially, there is no hard and fast rule in establishing it. Nevertheless, the case of Lyamuya Construction Company vs Board of Registered Trustees of Young Women Christian Associated of Tanzania, Civil Application No. 2 of 2010 (unreported) has laid down some factors to be considered when determining "good cause". These are as follow: -"(a) The applicant must account for all the period of delay; (b) The delay should not be inordinate; (c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and (d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.*

In **Blastus Alois Mgegera vs Board of Trustees of Tanzania National Parks** (Civil Appeal No. 310 of 2022) [2024] TZCA 217 (22 March 2024), at page 7 the Court of Appeal reiterated the need for the applicant to demonstrate a good cause before granting an application in exercise of the discretionary powers of the court. It stated that:

> *Let us begin by stating the obvious that in applications of this nature it is trite law that grant of an application for extension of time is entirely in the discretion of the court. This discretion, however, has to be exercised judiciously and the overriding consideration is that the applicant must show good cause or sufficient cause for the inaction within the prescribed time.*

Apart from procedural aspect on whether the District Court was properly moved to determine the application for setting aside the dismissal order, the appellant ought to have demonstrated good cause.

I am in concurrence with the respondent that the District Court was not properly moved to determine the application before it. It was proper for the District Court at Bahi to struck out the application for the same was not in consonance with provisions applicable to the exercise judicial discretionary powers for matter

originating from primary courts. The District Court was not properly moved to exercise its discretionary powers.

The application before the District Court was incompetent for failure to move the Court properly. The only remedy was striking out the application for being incompetent. In my view, the District Court acted properly within legal boundaries. This disposes the first ground.

Regarding the second is that there was a good cause for the application to be granted. This aspect should not detain me so much as the record reveals it all. I have thoroughly perused record of the district court including the proceedings relating to the appeal and application for setting aside the dismissal order, and ruling on the application for striking out the same.

It is on record that the appellant stated to have been hospitalized on 10/07/2023. However, the record reveals further that non-appearance was for three consecutive dates spanning from 24/05/2013 to 14/7/2023. There was failure to appear from the institution of the appeal for three consecutive months when the appeal was scheduled at the District Court.

The reasons advanced by the appellant on his failure to appear would not have meet the set criteria for application to set

aside the dismissal order. There was no good cause. I shall proceed to dismiss this ground of the appeal for being devoid of merits.

In totality of events, I am of a settled view that this appeal lacks merits thus deserves dismissal. I therefore proceed dismiss the appeal. I order no costs as this matter originates from matrimonial proceedings.

It is so ordered.

DATED at **DODOMA** this 23rd April 2024

Longopa.

E.E. LONGOPA
JUDGE
23/04/2024