

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CIVIL APPLICATION NO. 11 OF 2015

MUUNGWANA THABIT.....APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF

CHAMA CHA MAPINDUZI.....RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Tabora)

(Songoro, J.)

Dated the 17th day of November, 2015

In

Misc. Civil Application No. 21 of 2014

RULING OF THE COURT

11th & 29th April, 2015

MUSSA, J.A.:

In the High Court of Tanzania, Tabora Registry, the applicant lodged an application for enlargement of time within which to file a Notice of Appeal to this Court against the decision of the High Court (Masanche, J.) comprised in Civil Case No. 21 of 2000. In a Ruling dated the 17th November, 2014 the High Court (Songoro, J.) was disinclined to grant the application and, accordingly, dismissed it with costs.

The applicant is discontented and presently seeks to move the Court to revise the Ruling of the High Court. The application is by way of a Notice of Motion which is supported by an affidavit duly sworn by the applicant. The Notice of Motion has been greeted with a Notice of preliminary objection from the respondent which goes thus:-

- "(i) The Notice of Motion is defective for Non-citation of the enabling provisions of the law.*
- (ii) There is no Ruling of the High Court delivered by Songoro, J. dated 17th day of November, 2015 as stated in the Notice of Motion.*
- (iii) The supporting affidavit is bad in law for lack of clarity of the matters alleged in each paragraph."*

When the application was called for hearing before us on the 11th April, 2016, the applicant entered appearance in person but, his counsel, Mr. Kuwayawaya could not make it on account that he was engaged in the Court of Appeal sessions which were contemporaneously taking place in Dodoma. On the adversary side, the respondent entered appearance

through Mr. Mugaya Mtaki, learned Advocate. Given the fact that the Notice of preliminary objection was duly served on the applicant, the parties were agreed and, we so ordered them to argue the preliminary points of objection by way of written submissions upon a time frame which we prescribed. Both Mr. Mtaki and Mr. Kuwayawaya have filed their respective submissions within the prescribed schedule and this, now, is our Ruling with respect to the raised preliminary points of objection.

Arguing the first limb of the preliminary points of objection, Mr. Mtaki contended that it is patently clear that the applicant has not indicated, in the Notice of Motion, under which provision of the law the application is predicated. Counsel submitted that upon numerous decisions, the Court has held that a wrong citation or non-citation of the enabling provision has the effect of rendering incompetent the given application. Thus, on account of that infraction alone, Mr. Mtaki prayed that the application be struck out with costs. To fortify his submission, the learned counsel for the respondent referred us to the unreported Civil Application No. 37 of 2003 – **Marcky Mhango (on behalf of 684 others) vs. Tanzania Shoes Co. Ltd and Another.**

As regards the second limb of the preliminary objection, Mr. Mtaki simply contended that the Ruling desired to be impugned is, after all, not appended to the Notice of Motion. And, finally, in similar brief fashion, the learned counsel for the respondent suggested that the applicant's affidavit contravenes the provisions of Order XIX Rule 3(2) of the Civil Procedure Code, Chapter 33 of the Revised Laws. Mr. Mtaki similarly urged that the effect of these shortcomings was to render the application incompetent.

In his reply, the learned counsel for the applicant prefaced his submissions with a detailed background of the matter but, addressing the first limb of the preliminary objection, he casually explained it away as follows:-

" We note that there was omission on citing the enabling provisions. However, we think that it is not fatal to the Application and this Court can easily proceed to deal with the matter. This is simply a rule of procedure and long ago the Courts were of the view that, rules of procedure are not allowed to hinder substantial justice. This to me can answer the first limb of objection."

As regards the second limb of objection, Mr. Kuwayawaya, contends that the Ruling desired to be impugned is plenteous as the same is duly annexed to the Notice of Motion. Nonetheless, counsel concedes that there is a typing error on the face of the Notice of Motion through which the impugned Ruling is indicated to have been delivered on the 17th day of November, **2015** whereas the same was actually handed down on the 17th day of November, **2014**. The misdescription, counsel added, was a matter of sheer accident or even automation.

On the last limb of the preliminary objections, Mr. Kuwayawaya deplores the respondent for slackness to the extent of not being able to appreciate that each and every paragraph of the affidavit is specific and self explanatory. The learned counsel for the applicant further urged that the respondents claim that the applicant was in breach of Order XIX Rule 3(2) begs the question and is completely besides the point. In sum, the learned counsel for the applicant impressed on us to overrule the preliminary points of objection and proceed to a hearing on the merits.

Dealing with the learned rival arguments, we propose to first address the first limb of the respondent's point of objection. As candidly conceded by Mr. Kuwayawaya, the notice of Motion does not, at all, indicate the

provision of the law or Rule under which it seeks to move the Court. As correctly formulated by Mr. Mtaki, this Court has consistently taken the view that a wrong citation or non-citation of an enabling provision of the law or rule in support of the Notice of Motion renders the application incompetent. The decided cases on this point are numerous (see for instance, the unreported cases of Civil Application No. 20 of 1997-**National Bank of Commerce Vs. Sadrudin Meghji**; Civil Application No. 88 of 1998 – **Almas Iddie Mwinyi Vs. National Bank of Commerce**; Civil Application No. 64 of 2003 – **Citibank Tanzania Ltd Vs Tanzania Telecommunications Company Limited** and; **Marcky Mhango** (supra). In **Marcky Mhango** it was observed:-

"... the situation in the instant case is even worse. It was not a matter of wrong citation of the rule, but no rule at all was cited."

With due respect to Mr. Kuwayawaya, there is more to the non-compliance than a mere procedural mishap as, without a citation, the Court is not properly moved towards the exercise of its jurisdiction. The non-citation is also in contravention of Rule 48 (1) of the Tanzania Court of

Appeal Rules, 2009 (the Rules) which imperatively requires a Notice of Motion to cite the specific Rule under which it is brought.

To say the least, on account of the non-citation of the enabling provision which predicates the application, this application has been rendered incompetent. The non-compliance alone suffices to dispose of the application and; as we need not decide this matter more than is necessary for its disposal, we find it unnecessary to belabour on the remaining limbs of the preliminary objection. In the final result, the application is struck out with costs. Order accordingly.

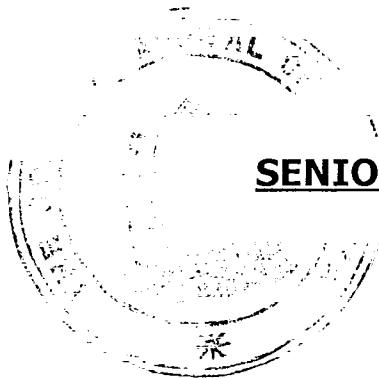
DATED at **TABORA** this 25th day of April, 2016.


S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL