

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 171/01 OF 2017

JIMMY LUGENDO.....APPLICANT

VERSUS

CRDB BANK LTD.....RESPONDENT

(Application for Extension of Time for the Notice of Appeal from
decision of the High Court of Tanzania at Dar es Salaam)

(Mwarija, J.)

dated 27th day of August, 2015

in

Civil Appeal No. 1 of 2009

RULING

8th November, 2017 & 30th April, 2019

LILA, J.A.:

JIMMY LUGENDO the applicant by way of a notice of motion moved the Court under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules, to extend time within which to file a notice of intention to appeal against the judgement of the High Court of Tanzania, Dar es Salaam Registry (Mwarija, J) delivered on the 27th August, 2015 in Miscellaneous Civil Appeal No. 1 of 2009. The notice of motion is supported by an affidavit sworn by the applicant.

In response, the respondent filed an affidavit in reply. The contents of it, prompted the applicant come up with a notice of *preliminary objection which was filed on 1/11/2017 that:-*

" that the respondent's affidavit in reply is bad in law for containing hearsay, without disclosing the service of information".

The notice of preliminary objection was preferred under Rule 107(1) of the Rules.

When the application was called on for hearing the applicant appeared in person, unrepresented and the Mr. Emanuel Kisusi, learned advocate, appeared representing the respondent.

As is a well established practice, hearing of the notice of preliminary hearing, takes precedence pf the substantive matter. In that accused, parties were invited to submit on the application and the parties duly complied.

However, the Court had noted that the applicant had raised the notice of preliminary objection under Rule 107(1) of the Rules. Out of curiosity, the Court wished to know from the parties whether the Court was properly moved to determine the objections raised. Parties were showed to address the Court on that issue.

The applicant conceded advise that Rule 107(1) of the Rules empowers only the respondent who intends to rely upon a preliminary objection to the hearing of an appeal to give the applicant a notice thereof. He was also quick to point out that Rule 107(1) of the Rules is not relevant and he could not see any other Rule preventing the applicant to raise a notice of preliminary objection in the passing he said Rule 4(2) (a) of the Rules could be used as there is no Rule which provides that an applicant can raise a preliminary objection.

On his part, Mr. Kisusi, straight away, attached the notice of preliminary objection on two fronts firstly he said Rule 107(1) of the Rules permits only the respondent to raise a notice of objection not the applicant and that the matter before the court is not an appeal

but an application. He thus concluded that the notice has been brought under a wrong provision of the law and the only remedy is to strike out the notice. He also added that even Government Notice No. 362 of 2017 did not amend Rule 107(1) of the Rules as it only delated sub Rules 2 and 3.

The applicant had nothing in rejoinder and he left the matter with the Court to decide.

With respect, this issue need not detain me. It is a common ground that the matter before the Court is an application not an appeal and also that under Rule 107(1) of the Rules, it is only the respondent who is entitled to raise a notice on point of preliminary objection. There is no specific Rule in the Rules which an powers the applicant to file a notice of preliminary objection. The Court gave a guide on what should be in these circumstances in the case of Haji Hassan Amowe and 112 others Vs The Managing Director, Peoples Bank of Zanzibar, Civil Application No. 2o of 2011 CAT (Dar es Salaam Registry) (unreported) where it categorically stated that:-

"The Court has held in the case of The University of Dar es Salaam Vs Silvester Cyprian and 210 Others (1998) TLR 175) that a preliminary objection can be raised in an application but not using Rule 100 (of the 1979 Rules which is similar to Rule 107(1) of the 2009 Rules). The enabling provision has, therefore to be Rule 4(2)(a) of the 2009 Rules. Rule 4 is an aid to the Court..."

Given the above position of the law, the applicant could file a notice of preliminary objection using Rule 4(2)(a) of the Rules. That Rule provides:-

" (2) where it is necessary to make an order for the purpose of-

*(a) **Dealing with any matter for which no provision is made by these Rules or any other written law..."***

In view of the above the applicant wrongly moved the Court by filing the notice of preliminary objection under Rule 107(1) of the Rules. He cited a wrong provision of the law. The Court is not properly moved, therefore.

The issue that immediately arises is what are the consequences of citing a wrong provision of law? It is trite law that wrong citation of the enabling or applicable law in moving the Court renders the application incompetent and liable to be struck out (See Edward Bachwa and Three Others Vs The Attorney General and Another, Civil Application No. 128 of 2006, CAT, unreported).

Although the above principle was laid down by the Court while considering. Whether the Court was properly moved to determine an application, the same legal consequences, in my firm view, follow in events when a wrong provision of the law is cited in raising a notice of preliminary objection.

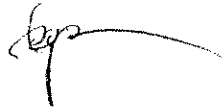
In the circumstances the applicant's notice of preliminary objection is defective for want of proper citation of the enabling or applicable Rule. The same is therefore incompetent.

In fine, the applicant's notice of preliminary objection is struck out. Each party to bear its own costs.

DATED at **DAR ES SALAAM** this 12th day of March, 2019

S.A. LILA
JUSTICE OF APPEAL

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



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL

In fine, the applicant's notice of preliminary objection is struck out. Each party to bear its own costs.

DATED at DAR ES SALAAM this 12th day of March, 2019

S.A. LILA
JUSTICE OF APPEAL

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