IN THE HIGH COURT OF TANZANIA

AT DODOMA

MISC. CIVIL APPLICATION NO. 29 OF 2012

(Arising from the Decision of the Hon. Deputy Minister for Education issued on 2nd May, 2012)

CENTRAL SECONDARY SCHOOL ..... APPLICANT

VERSUS

1. DEPUTY MINISTER FOR EDUCATION
2. COMMISSIONER FOR EDUCATION
3. THE ATTORNEY GENERAL } **..... RESPONDENTS**

RULING

25/10/2012 & 01/11/2012.

KWARIKO, J:

The applicant filed this application for leave of this court to apply for prerogative orders of *Certiorari* and *Mandamus* against the respondents herein. The application has been supported by the affidavit of one **GODWIN KIGALA,** the Managing Director of the applicant. It has been essentially deponed in the affidavit that by letter dated 11/5/2012 written by Acting Commissioner of Education the applicant's school was closed ant its registration cancelled after the 1st respondent gave order to that effect. That, this decision had been taken against the principles of natural justice and contrary to the law.

This application has been brought under **section 2 (2) of the Judicature and Application of Laws Act, Cap. 358 R.E. 2002 and section 18 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Cap. 360 as Amended by Act No. 55 of 1968.**

In response to this application the respondents filed their counter-affidavit through the Attorney General's Chambers in Dodoma whereas a notice of preliminary objection has also been filed to the effect that;

> *"The application at hand is improperly brought before this honourable court for wrongful citation of the enabling provisions."*

During the hearing of the preliminary objection Ms. Shio learned Senior State Attorney appeared and argued the same on behalf of the respondents. Ms. Shio submitted that the applicant cited wrong enabling provisions of the law and they are non-existent as they are not in the statute books. That, these provisions of the law cannot be used to move the court to grant the reliefs sought. It was the contention of Ms. Shio that the application ought to have cited in this respect **section 18 of the Law Reform [Fatal Accidents and Miscellaneous Provisions] Act Cap. 310.**

Ms. Shio thus contended that the wrong citation renders the application incompetent. Two cases of the Court of Appeal of Tanzania of **AMIRI ATHUMANI Vs. THE DPP,** Criminal Appeal No. 2 of 2008 at Arusha, [Unreported] and **JOHN DAVID KASHEKYA Vs THE ATTORNEY GENERAL,** Civil Application No. 1 of 2011, at Dodoma, [Unreported] had been cited to cement the foregoing contention. Thus, Ms. Shio Learned Senior State Attorney prayed this application to be struck out with costs.

In reply to the foregoing submission, Mr. Njulumi Learned Advocate for the applicant charged that **section 2 of the Judicature and Application of Laws Act** has been properly cited in support of this application. He contended further that the citing of **section 18 (2) of the Law Reform [fatal Accidents and Misc. Provisions] ordinance Cap. 360 as amended by Act No. 55 of 1968** is quite proper in this respect.

However, Mr. Njulumi was quick to concede that the citing of Cap. 360 was wrong but was only a slip which can be rectified. And that the citing of Amendment Act No. 55 of 1968 was just a human error which is not fatal which he said can be rectified. He thus prayed to be allowed to amend the chamber application to that effect. A case

of **ZOLA & ANOTHER V RALLI BROTHERS LTD & ANOTHER (1969) EA 691** was cited to cement that assertion.

Ms. Shio on the other hand in her rejoinder objected the applicant to be allowed to amend the chamber application since the wrong citation is not only human or typographical error but the same goes to the root of the enabling provisions. That, the omission is a fatal error which cannot be rectified.

Following the contending counsel's submissions the issue to be decided is whether the applicant cited wrong enabling provisions of law and if so, whether he can be allowed to amend the chamber application.

This court is in agreement with Mr. Njulumi that the citing of **section 2 (2) of the Judicature and Application of Laws Act** (supra) is proper since this provision gives jurisdiction to the High Court to extend to the territorial waters, it says;

> *"For the avoidance of doubt it is hereby declard that the jurisdiction of the High court shall extend to the territorial waters".*

And this subsection is preceded by subsection (1) which says;

> *"save as provided hereinafter or in any written law, expressed, the High court shall have full jurisdiction in civil and criminal matters".*

By *"full jurisdiction"* it means the High Court can hear any matter whether civil or criminal like the present one.

As for the citation of **section 18 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Cap. 360** as amended by **Act No. 55**

of 1968, I agree with both parties that this is improper and wrong citation of the enabling provisions of the law.

It is not only wrong citation but the provision is not existent in our statutes books as rightly contended by Ms. Shio.

Therefore, I do not agree with Mr. Njulumi that it was a shop or a human error. Thus, this improper citation of the enabling provision cannot be rectified by amending the chamber application. And the case Mr. Njulumi cited is distinguishable from the present case. It did not decide the issue of non-citing or wrong citing of the enabling provision of the law. That case **ZOLA & ANOTHER V. RALLI BROTHERS LIMITED AND ANOTHER (Supra)** discussed among other things not related to present case, the issue of affidavit in support of the application not complying with relevant law. That is why it was said at page 694 that;

> *"I am also satisfied that there is no reason to hold that the affidavit was a nullity. If it was merely irregular in some respects it was open to the trial judge in his discretion to act upon it. He has done so and I see no reason whatsoever to interfere with the exercise of his discretion".*

This is the question where the affidavit contains matters which in the discretion of the court can be expunged from therein but leave the affidavit intact.

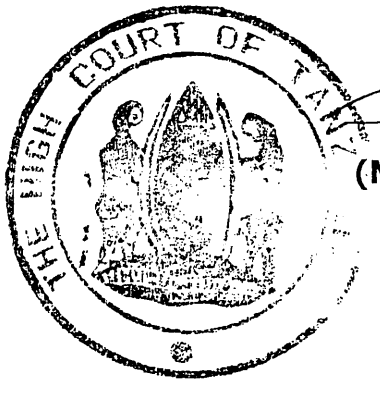
I understand that Mr. Njulumi had insisted to act on this cited case because it was said that **"courts should hesitate to treat an incorrect or irregular act as a nullity, particularly where the act relates to matters of procedure".** However, wrong or non-citation of the enabling provision of law is not a procedural irregularity but it goes to the root of the matter. Relevant laws are the ones which move the court to entertain a certain matter and thus non or wrong citation does not give the court powers to act in that effect.

Therefore, the applicant should have cited **section 18 of the Law Reform [fatal Accidents and Miscellaneous Provisions] Act Cap. 310 R.E. 2002** of course along with **section 2 of the Judicature and Application of Laws Act Cap. 358 R.E. 2002** to properly move the court to entertain the application.

And non or wrong citation of the relevant law has been held to be fatal as provided in the two cases of the Court of Appeal of Tanzania cited earlier. In the case of **AMIRI ATHUMANI VR (supra)** which applied with approval the case of **CHINA HENAN INTERNATIONAL CO-OPERATION GROUP V SALVAND K. A. RWEGASIRA [2006] T.L.R 220** it was held that;

> *"It is now settled that wrong citation of a provision of the law or rule under which the application is made renders the application incompetent".*

With the foregoing citation I find my hands tied and I hold that this application is incompetent for wrong citation of the enabling provision of the law. The same is thus struck out with costs. It is ordered accordingly.



(M.A. KWARIKO)

JUDGE

01/11/2012

DELIVERED AT DODOMA

01/11/2012

Applicant: Present/Mr. Njulumi Advocate

Respondents: Ms. Magesa State Attorney

C/C: Ms. Judith

(M.A. KWARIKO)

JUDGE

01/11/2012