IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION No. 40 OF 2012

1. GULAMALI SHAH BOKHARI.....1ST APPLICANT
2. YOHANA HILARIUS NYAKIBARI.....2ND APPLICANT

Versus;

THE REPUBLIC..... RESPONDENT

ORDER

03/09/2012 & 13/08/2014.

Utamwa, J.

This is an Order on an application made by the applicants, Gulamali Shah Bokhar and Yohana Hilarius Nyakibari, against the respondent, the Republic. The application is made by way of chamber summons supported by an affidavit jointly sworn by the two applicants. It is preferred under s. 44 (1) (a) of the Magistrates Court Act, Cap. 11 R. E. 2002. The applicants are applying for the following, and I will reproduce their prayers for the sake of a readymade reference;

1. This court be pleased to give directions upon exercising its general powers of supervision by calling for, inspecting, examining as to the correctness of the records of the proceedings of RM's Court of Dar es salaam (trial court) in criminal case No. 1 of 2003 between the parties herein wherein the court intends to proceed to defence case on a charge sheet that is a nullity by virtues of the fact that;
   i. The charge sheet intended by the court to proceed with was read in that court on the 12th day of June, 2006 and by that time the court had no jurisdiction as the proceedings therein was at appeal level in the High Court of Tanzania at Dar es salaam.
   ii. Upon the opening of the prosecution's case no reading of the charge sheet to enable the accused to plead was conducted and trial proceeded

therefore proceeded; presumably on a defective charge sheet ordered to be amended and or no charge at all.

iii. Denying the accused persons a ruling on the submission of no case to answer for reason of citing wrong section of the law and order defence case to start on a charge that is unknown to the proceedings amounting to the court losing direction.

2. Any other and further relief this court deems just and fit be ordered or directed.

When the respondent indicated its intention to object the application, this court directed it to file a counter affidavit. The respondent instead, filed an unsworn document titled "affidavit," and when the matter was fixed for hearing, the respondent prayed for adjournment. The court ordered this application to proceed *exparte* reserving the reasons to this Order. I will thus give the reasons for that order before I proceed to determine the application.

The reasons for the order to proceed *exparte* were these; the respondent conducted himself with a laxity that delayed the case. It could not file a counter affidavit when asked to file one. On the hearing date another state attorney represented the respondent, but was not ready to proceed and prayed for another adjournment. That conduct was considered as a factor of delaying the application, hence this Order instead of a Ruling. I will now revert to the application itself.

The applicants were ordered to argue the application by way of written submissions and they accordingly filed the same. However, when I sat to record the verdict in respect of this application, I noted two suspected serious irregularities in the application. I thus, under the auspices of the decisions by the Court of Appeal of Tanzania (CAT) in **Zaid Sozy Mziba v. Director of Broadcasting, Radio Tanzania Dar es Salaam and the Attorney General, Civil Appeal No. 4 of 2001, at Mwanza** (unreported) and **Pan Construction Co. Ltd and another v. Chawe Transport Import and Export Co. Ltd, Civil Reference No. 20 of 200, at Dar es salaam** (unreported), re-opened the proceedings and invited the applicants to address me on the two points. This followed the understanding that, though it was ordered that this application should proceed *exparte*, this court is still legally bound to determine it according to law. The two legal points were these;

a) That, though the chamber application moves this court to exercise its supervisory powers and give directions to the trial court, it did not specify which directions the court should make. It was only at the last paragraph of the written submissions supporting the application that the applicants' counsel disclosed the sought direction in the following terms, and I quote for the sake of a readymade reference;

> "It is therefore, my humble submission that by virtue of the operation of section 44 (1) (a) of the Magistrates Courts Act, Cap. 11 R. E. 2002 you exercise your powers in the interest of justice and direct the trial court to bring to an end the proceedings in criminal case No. 1 of 2003 for reasons contained in the application and this submissions. I so submit"

b) That, the jurat of attestation in the affidavit supporting the application does not disclose (in the body of the jurat) as to where in particular, the respective oaths of the two applicants/deponents were administered.

Upon re-opening the proceedings, I framed two issues and invited Mr. Okwong'a the learned counsel for the applicants to orally address me as hinted previously. The two issues were these;

1. Whether or not this court was properly moved following the lack of specific directions sought by the applicants in the chamber summons (this was in regard to the first irregularity pointed out herein above).
2. Whether or not the affidavit supporting the chamber application was proper in law for want of disclosure of the place of oath in the body of the jurat of attestation (this was in respect of the second irregularity shown herein above).

I will first discuss the second issue. The learned counsel for the two applicants briefly argued that the jurats of attestation in respect of both applicants showed, at the bottom of each of them, the place of their respective oaths to be in Dar es salaam. Upon a re-perusal, I agree with the learned counsel that the place of oath is in fact shown at the bottom of the jurats of attestation, though not conspicuously so. I thus find that this style is not fatal to the affidavit and the second issue is determined positively.

As to the first issue, the learned counsel for the applicants submitted that the court was properly moved because the directions sought are under paragraph 1 (i) – (iii) of the chamber summons. He added that, the applicants moved this court to

make directions that the proper charge sheet against them was that dated 16/4/2003, and the trial court's act of denying them an order for no case to answer (basing on the charge sheet dated 12/4/2006) was a nullity. He further argued that the applicants also wanted the court to declare the whole proceedings of the trial court a nullity.

When the court sough more clarifications from the learned counsel, he contended that, the directions he has suggested above are implied under paragraph 1 of the chamber application. As to the prayer made at the last paragraph of his written submissions (quoted herein above), the learned counsel argued that, that prayer is also implied under paragraph 1 of the chamber summons, but the court can also grant it under paragraph 2 of the chamber summons which seeks for "*Any other and further relief this court deems just and fit be ordered or directed*".

In determining this (first) issue I will firstly consider the wording of s. 44 (1) (a) of Cap. 11 under which the chamber summons was preferred. The provisions are couched thus, and I will quote them verbatim for an expedient reference;

> "44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–
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> (a) shall exercise general powers of supervision over all district courts and courts of a resident magistrate and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers may be necessary in the interests of justice, and all such courts shall comply with such directions without undue delay"

In my view, these self explanatory provisions of law give to this court supervisory powers that mandate it to make directions (to subordinate courts), as additional powers to the authority already vested to it by other legal provisions. The scope of such additional powers to make directions is, of course, too general. Nevertheless, in exercising such powers, this court must first satisfy itself that the directions to be made under these provisions are in conformity with other laws. In other words, the legislature did not enact s. 44 (1) (a) of Cap. 11 as the provisions of law giving to this court an un-limited jurisdiction to make any direction whatsoever. It follows therefore that, any

person who moves this court to exercise such additional powers under s. 44 (1) (a) (of giving directions), must also cite other pertinent legal provisions that give this court substantive powers related to the directions that such person wants this court to give. He must also cite the law that gives him/her an entitlement to the sought directions and the law guiding the procedure for seeking such directions.

The requirement just envisaged here in above follows the understanding that, the law requires a person moving a court of law in an application to cite not only the law that gives the court the powers to make the orders/directions sought (as the applicants did in the matter at hand), but also to cite the law that guides the procedure of making the application, and the law which gives the applicant the entitlement to the sought orders/directions, see the envisaging by the CAT in the case of **Chama Cha Walimu Tanzania v. The Attorney General, TCA Civil Application No. 151 of 2008, at Dare es Salaam** (unreported). I would add here that, this position of the law is more so where the applicant is legally and ably represented as in the case under consideration.

The applicant in the matter under consideration however, did not cite all the other enabling laws, except s. 44 (1) (a) of Cap. 11. Moreover, by reading the chamber summons at hand I see no any specific direction sought by the applicants. In paragraph 1 of the chamber summons the applicants only invited this court to make general directions following the facts narrated under sub-paragraphs (i) – (iii). Paragraph 2 of the chamber summons which seeks for any other relief that this court would deem fit to order or direct is in fact, more general than paragraph 1. The applicants did not cite any law that gives this court substantive powers to make the envisaged other directions or orders or showing that the applicants are entitled to such orders/directions. The applicants thus want to put this court into a fishing expedition of perusing all the laws of this country in finding which directions it can make for them. This is not a proper procedure of moving courts of law and was discourage by the CAT in the case of **Bahadir Sharif Rashid and 2 others v. Mansour Sharif Rashid and another Civil Application No. 127 of 2006, at Dar es Salaam** (unreported).

Even if the applicants think that the law permits them to move this court basing solely on s. 44 (1) (a) of Cap. 11, they could not avoid specifying in the chamber summons the directions they want this court to make. The specification of the directions would assist the court to determine whether or not it has jurisdiction so to act and whether or not the applicants are entitled to the directions so specified. Our judicial practice requires any document originating court proceedings to specify the reliefs sought by the person moving the court. This follows the understanding that court proceedings are always commenced for specific purposes. It follows thus that, an application, whether criminal or civil, that does not specify the reliefs for which it was filed become purposeless, hence incompetent. This is because, in law, it is the chamber summons that moves this court and that originates the proceedings in respect of the application and the sought reliefs, which said chamber summons must be supported by an affidavit stating the reasons for the sought reliefs. This is the spirit under s. 392A (2) of the Criminal Procedure Act, Cap. 20 R. E. 2002, as amended by s. 24 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011 which provides that an application made in written form shall be by way of a chamber summons supported by affidavit. In my view therefore, it was not enough for the applicants to merely invite this court to make directions under s. 44 (1) (a) of Cap. 11 without specifying them in the chamber summons.

My further views are that, it was not enough for the applicants to amplify or indicate the directions they wanted this court to make in the submissions by their counsel, that they were minded to move this court to make an order nullifying the order of the trial court that found them with a case to answer and the entire proceedings thereof, or that they intended to move this court to direct the lower court to terminate the criminal proceedings before it. If the applicants intended to move this court in making such directions, the nature of which involves revisional powers of this court, they would have cited the proper provisions for revisional purposes and they would have expressly indicated/disclosed the sought orders in the chamber application, but they did not do so.

The arguments by the learned counsel for the applicants that the orders suggested in his written and oral submissions were implied into the chamber application does not move me an inch for, reliefs sought by parties to this court must be express and specific, they should not be implied. After all, this court cannot exercise the powers vested to it under s. 44 (1) (a) of Cap. 11 to make the orders/directions suggested in the written and oral submissions by the counsel for the applicants since they are in the nature of revisional orders. The CAT held in the case of **Director of Public Prosecution v. Elizabeth Michael Kimemeta @ Lulu, CAT Criminal Application No. 6 of 202, at Dar es salaam** (unreported) that this court cannot make revisional orders under such provisions of law. In that case the CAT observed further that, s. 44 (1) (a) of Cap. 11 only gives to this court powers to supervise subordinate courts and not to revise their proceedings. It also remarked that the word "supervise" means to watch or otherwise keep a check where as to "revise" is to re-examine in order to correct or improve. The CAT further observed that the directions envisaged under these provisions are only in the nature of guidance from the High Court to subordinate courts.

For the aforesaid grounds, I am convinced that this application suffers from serious irregularities coupled with misconception of the law and non-citation of the law which renders it incompetent; see the **Chama Cha Walimu Tanzania** case (supra). I consequently answer the issue posed herein above negatively to the effect that this court was not properly moved. I accordingly find the application incompetent and I strike it out. I make no order as to costs as this is a criminal matter and the respondent acted with laxity in conducting the matter as indicated previously.

JHK. UTAMWA

JUDGE

13/08/2014

13/08/2014

CORAM; Hon. Utamwa, J.
For Applicants; Both present.
For Respondent; Absent.
BC; Mrs. C. Omary.

Court; Ruling delivered in the presence of both applicants and in the absence of the respondent, in chambers this 13th day of August, 2014.

JHK. UTAMWA

JUDGE

13/08/2014