IN THE HIGH COURT OF TANZANIA

AT TABORA

MISCELLANEOUS LAND APPLICATION No.17 OF 2016

(Arising from High Court Land Case No. 3 of 2012. at Tabora).

CHONGQUING FOREIGN TRADE
AND ECONOMIC COOPERATION
(GROUP) CO. LTD.....APPLICANT

VERSUS

ZAKAYO M. MSENGI..... RESPONDENTS

08 & 12/3/2016

Utamwa, J

This is a ruling on a preliminary objection (PO) raised by the respondent ZAKAYO M. MSENGI against the application preferred by CHONGQUING FOREIGN TRADE AND ECONOMIC COOPERATION (GROUP) CO. LTD (the applicant). According to the chamber summons which is supported by an affidavit of one Peng Ding, the application is preferred under some provisions of law and I quote verbatim the relevant part of the chamber summons showing the provisions for a readymade reference:

> "Made under section 14 (1) of the **Limitation Act** and order XXXIX RULE 5 and section 95 of the **Civil Procedure Code, 2002 R. E.** of the Laws and any other enabling provisions of the law." (bold emphasis is provided).

In the chamber summons the applicant seeks for the following orders which I also reproduced verbatim for the same objective of an expeditious reference:

1. That this Hon. Court be pleased to extend time for which the applicant can be heard on the application for stay of execution of the High Court's Decree in Land Case No. 3/2013 pending hearing and determination of the application to lodge a notice of appeal out of time.
2. That having extended time, this Hon. Court stay execution of the said decree dated 29/11/2013 pending determination of the application to lodge a notice of appeal out of time.
3. Any other relief the court shall deem just to grant.

The PO was raised along with the counter affidavit against the application. It was previously based in five points. However, at the hearing the learned counsel for the respondent dropped the fifth point, hence four only were argued. The four surviving points of the PO were these:

1. That, the application is incompetent for wrong and or non-citation of the enabling provisions of the law.
2. That, the application is misconceived as the same is filed in this court which has no jurisdiction to hear and determine stay of execution in a matter for appeal to the Court of Appeal of Tanzania (herein after called the CAT).
3. That, having been not signed and stamped by the one who drew and filed the chamber summons and supporting affidavit thereof then the application is incompetent before the court.
4. That, the application is incompetent as prayers in the chamber summons are not recognised.

For these limbs of the PO the respondent urged this court to strike out the application for incompetence. The applicant vehemently contested the PO.The PO was argued orally, and the respondent was represented by Mr. Mussa Kassim learned counsel while the applicant was advocated for by Mr. J.

Byabato learned advocate. Both sides made lengthy submissions for and against the four points of the PO. hence this ruling.

In my adjudicating plan I will test the points of the PO in the following pattern; I will start with the first and second points cumulatively (which upon the submissions by the parties I noted that they are closely related). In this assignment I will consider the law and arguments related to the two points and make a finding thereof before I consider the arguments and law regarding the other points. In case I will overrule the two first points. I will proceed to test the rest of the points. But if I will uphold the first two points of the PO I will make necessary orders. My adjudication strategy is based on the ground that the first two points of PO are legally forceful enough to dispose of the entire matter if upheld.

In supporting the first two points of the PO Mr. Mussa learned counsel for the respondent argued that the applicant wrongly cited the provisions of the enabling law in the chamber summons because the application is pegged under s. 14 (1) of what the applicant calls the "Limitation Act" but it (the applicant) did not indicate which chapter of the laws of the country is that. He further contended that the applicant also based the application on Order XXXIX rule 5 and s. 95 of what it referred to as the "Civil Procedure Code, 2002 R. E." which did not also indicate which chapter of the laws was it. He charged that such cited laws do not exist in Tanzania.

Mr. Mussa learned counsel further submitted that since the applicant applies for the orders mentioned above pending the determination of hearing of an application for lodging a notice of intention to appeal to the CAT (against the original decree of this court in Land Case No. 3 of 2012 between the parties in this application) out of time, then if the two wrongly cited Acts meant the Law of Limitation Act, Cap. R. E. 89 and the Civil Procedure Code, Cap. 33 R. E. 2002respectively, such statutes will not apply in this matter. The statutes apply in appeals from subordinate courts to this court only. He contended further that

appeals from the High Court to the CAT are governed by the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 and the Court of Appeal Rules, GN.No. 368 of 2009 (the Rules) only. The applicant could have thus applied for the stay of execution before the CAT under rule 11 (2) (b) of the rules.

The learned counsel also submitted that the applicant did not specify the sub-rules of Order XXXIX rule 5 under which the prayersin the chamber summons were made though rule 5 has four sub-rules. He added that sub-rule 3 of rule 5 also has sub-sub-rules but the applicant did not bother to specify them. He also contended that the provisions of Order XXXIX rule 5 (1) of Cap. 33 are related to matters in which an appeal has been filed which is not the case in the matter at hand.

The counsel added that s. 14 (1) of Cap. 89 applies for extending time for appeals and applications yes, but it does not apply in extending time for filing applications for staying decrees like the one at hand. He thus argued that for the irregularities demonstrated above this court lacks jurisdiction to entertain the application at hand. He also contended that the law requires the applicant to pay security for costs before the stay is granted, but it did not do so. He thus urged this court to strike out the application for been incompetent.

In replying to the submissions in chief regarding the first two point of the PO Mr. Byabato conceded that the citation of the enabling provisions did not indicate the chapters of the two statutes cited. However, he argued that the miss-citation of the chapters was not fatal to the extent of rendering the application incompetent. The court can take inference that the cited provisions are the proper enabling ones under the circumstances of the case for the prayers sought in the chamber summons. This is so he submitted, since no notice of intention to appeal to the CAT has been filed. He further charged that the omission does not prejudice the respondent in any way.

Mr. Byabato learned counsel also submitted that the non-specification of the sub-rules of rule 5 of Order XXXIX of Cap. 33 is also a not a big issue since the

applicant wanted to apply all the sub-rules of rule 5. He also argued that Order XXXIX of Cap. 33 and s. 14 (1) of Cap. 89 do not apply to appeals from subordinate courts to the this court only, they also apply in matters pending appeal to the CAT when a notice of intention to appeal has not been filed yet as in the matter at hand. The CAT rules do not thus apply at this stage.

In his rejoinder submissions Mr. Mussa learned counsel reiterated his submissions in chief and underscored the prayer for striking out the application.

From the arguments by the parties regarding the first two points of the PO it is clear that parties do not dispute that there is miss-citation of the two enabling statutes for want of indicating the chapters thereof. The parties do not also dispute that the applicant did not specify under which sub-rule of rule 5 to Order XXXIX of Cap. 33 was the application based. The squabble between the parties is in respect of the legal effect of such omissions in citing the enabling laws. While the respondent argues that the omissions are lethal to the application the applicant maintains that they are not.

The issue under this heading is thus whether or not the omissions complained of by the respondent are fatal to the application to the extent of rendering the application incompetent. In my view, the way the applicant cited the two statutes and the provisions thereof is very odd and demonstrates a great laxity in drafting the chamber summons. Parties to court proceedings do not just cite statutes the way they feel convenient. An Act of parliament in this country is identified from other Acts by its approved modes of citation. Parties moving courts in this country, especially when legally represented must thus fully cite the statutes under which they peg their applications.

A party can properly cite a statute in its original short name as indicated in the statute itself and specify the year of its enactment and its chronological number of enactment in a given calendar year. Under this style of citing pieces of legislation the applicant was expected to cite the two statutes thus: "The Civil Procedure Code, Act No. 49 of 1966." The short name for citing this Act is

provided for under s. 1 of the Act which provides that "This Act may be cited as the Civil Procedure Code." Regarding the other statute the applicant could have cited it thus; "The Law of Limitation Act, No. 10 of 1971." Its short name for citation is provided for under s. 1 of the Act providing that "This Act may be cited as the Civil Procedure Code."

Alternatively a party to court proceedings can cite a statute according to its chronological chapter-number assigned to it by virtue of the Revision Editions of our laws made under the Laws Revision Act, Chapter 4 of the Revised Edition of 2002. Under this style of citing statutes the word "Chapter" is abbreviated as "Cap." and the term "Revised Edition" as "R. E." By following this style of citing legislations the applicant was expected to cite the two statutes under discussion thus; "The Civil Procedure Code, Cap. 33 R. E. 2002" and "the Law of Limitation Act, Cap. 89 R. E. 2002." This is how a statute could be properly identified under this style which is also noticeable judiciously under s. 20 of Cap. 4 R. E. 2002 and s. 58 of the Law of Evidence Act, Cap. 6 R. E. 2002.This is also the way statutes are cited under the alphabetical and chronological indexes of the Revised Edition of Laws under the Supplementary Volume of the Revised Edition of our Laws of 2002.

A panel of three Judges of this court also solidly underscored the existence of the above discussed Revised Editions of the laws in the case of the **Legal and Human Rights Centre and others v. Attorney General [2006] 1 EA 141** where it held that the court takes judicial notice under section 58 (1) (a) of the Law of Evidence Act (Chapter 6 RE 2002) that there is now a revised edition of the Laws of Tanzania. The revised edition is for the year 2002 and it was prepared on the authority of the Laws Revision Act (Act number 7 of 1994) which was made operative retrospectively by Government Notice number 124 published on 6 May 2005. The Act provided for the preparation and publication of a revised edition of the Laws of Tanzania and for continuous revision and maintenance up to date.

For the observations I have made above, the way the applicant identified the two statutes by citing them as "the Limitation Act" and "the Civil Procedure Code, 2002 R. E." without mentioning either their respective chronological numbers and years of enactment or their respective chronological chapter-numbers did not meet any of the approved ways of citing statutes in this country. The miss-citation was thus in my view a wrong citation and a serious blunder entitling Mr. Mussa learned counsel for the respondent to conclude that the cited statutes are non-existent in the country. I could have thus answered the issue posed herein above in favour of the respondent for this reason only.

However, even if it is presumed (without deciding) that the applicant style of citing the statutes was not fatal, this court could still find serious shortcomings in the citation of the provisions of the Acts. The provisions of s. 14 (1) of Cap. 89 for example are totally inapplicable in extensions of time related to execution of decrees since the same provisions expressly guide so as rightly argued by Mr. Mussa learned counsel.

Again, the fact that the applicant did not specify the sub-rule of rule 5 of Order XXXIX of Cap. 33 under which the application was based was fatal in law since the sub-rules guide on different circumstances. The learned counsel for the applicant could not thus argue that the application was based on all the 4 sub-rules. Sub-rule (2) for example, gives powers to a court which passed the decree to stay execution of the decree where an application for stay is made before the expiry of the time for appealing, which is not the case in the matter at hand. Again, sub-rule (4) gives the court powers to make orders staying execution of decrees *exparte*, but this is not the case in the matter under discussion since the applicant did not make any *exparte* application for the stay.

In my view Mr. Byabato learned counsel seems to be taking the issue of wrong or non-citation lightly. But unlike in Uganda, the Tanzanian position is very different. In Uganda wrong or non-citation of an enabling law in an application or even a defect in an affidavit supporting the application are not

fatal if the court has the requisite jurisdiction to entertain the application, see the decision by the Court of Appeal of Uganda sitting at Kampala in **Saggu v. Roadmaster Cycles (U) Ltd [2002] 1 EA 258**.

In this land however, wrong or non-citation of the enabling law in an application is a big issue so to speak. It is a fatal omission that renders the application incompetent and erodes the jurisdiction of the court in entertaining the application. There is a heap of authorities for this stance, see for example; the decision by the CAT in **Chama Cha Walimu Tanzania v. The Attorney General, Civil Application No. 151 of 2008, CAT at Dar es Salaam** (unreported), **Naibu Katibu Mkuu (CCM) v. Mohamed Ibrahim Versii and sons, Zanzibar Civil Application No. 3 of 2003, CAT at Dar es Salaam** (unreported) and **Almas Iddie Mwinyi v. National Bank of Commerce Civil Application No. 88 of 1999, CAT at Dar es Salaam** (unreported).

The CAT in the case of **Chama Cha Walimu Tanzania** (supra)went further andheld that the omission to cite the enabling provisions of law or wrong citation in applications is not a procedural technical matter within the scope of article 107A of the Constitution of the United Republic of Tanzania, 1977 (Cap. 2, R. E. 2002), it is a serious omission that goes to the root of the matter. Moreover, a panel of three Judges of this court (in which I was a member) also unanimously held in **Paul J. Mhozya v. the Permanent Secretary, Ministry of Education and the Attorney General, Misc. Civil Cause No. 71 of 2003, HCT at Dar Es Salaam (Unreported)** thatthe omission to cite a specific or proper provision of law under which the matter is based affects the jurisdiction of the court to entertain the matter.

The view just highlighted above was further underscored by the CAT when it held that the court does not derive any jurisdiction to entertain the application before it from the wrong citation or non-specification of the enabling law under which the application is made, see the case of **M/S Ilabila Industries Ltd. & 2**

Others v. Tanzania Investment Bank & Another, CAT Civil Application No. 159 of 2004, at Dar es Salaam (unreported). It also held in the case of **Citibank Tanzania Limited v. Tanzania Telecommunications Co. Ltd and 3 others, CAT Civil Application No. 64 of 2003, at Dar es salaam** (unreported) that a court derives jurisdiction to entertain an application before it from the properly specified sub-section of the enabling provisions of the law. In other words the CAT envisaged that without proper citation of the enabling law or without specifying a sub-section of the enabling section the court lacks the requisite jurisdiction. This position on the effect of non-specifying the sub-section or paragraph of a section of the enabling law was also underscored in **Edward Bachwa and 3 others v. the Attorney General and another, CAT Civil Application No. 128 of 2006, at Dar es salaam** (unreported) in which the CAT underscore that there is a chain of authorities discarding that particular omission.

I am therefore, settled in mind that according to our law categories of wrong or non-citation of enabling provisions of law are never closed, they range from absolutely missing or failure to cite the relevant law, citing an irrelevant law, failure to specify an applicable sub-section of the section of law, to an improper citation of the enabling statute as demonstrated in the matter at hand. There may however be other ways of wrong citations of laws.In **Ernest A. Mwakasala and another v. Kinondoni Municipal Trade Officer and two others, High Court Misc. Civil Case No. 96 of 2005, at Dar es salaam** (unreported) for instance, I held that citing the statutes of this land as ordinances amounted to a wrong citation of the enabling provisions since ordinances no longer exist upon the enactment of Cap. 4 (supra) and the enforcement of Revised Edition of Laws.The position according to s. 23 (2) of Cap. 4 is that the text of the laws in the ordinances have been superseded by the respective texts of the laws

contained in the Revised Edition and annual supplements prepared under Cap. 4.

One of the rationales for theabove underscored rule against improper or non-citation of the enabling laws in applications is that, it is intended to relieve the courts from the torment of perusing the bulky existing statutes, sections and sub-sections of such statutes in search of the applicable provisions of law. For this understanding the CAT once made useful remarks in **Bahadir Sharif Rashid and 2 others v. Mansour Sharif Rashid and another, CAT Civil Application No. 127 of 2006, at Dar es Salaam** (Unreported), and I quote the same for an expedient reference:

> "The court should not be made to go on a fishing expedition pouring over sections, rules and the like in order to ascertain whether or not it has jurisdiction to make the particular order"

In my view therefore, this rule against improper citation of enabling law is fundamental and cannot be relaxed by courts of law.

It must also be noted here that most of the precedents cited above were decided by the CAT. The law provides that CAT decisions bind tribunals and courts subordinate to it including this court, irrespective of the correctness or otherwise of such decisions, see **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda Cha Uchapishaji cha Taifa [1988] TLR. 146.** This stance of the law is by virtue of the common law doctrine of *stare decisis* which is applicable in our jurisdiction too. I am thus bound to follow the stance of the law as guided by the CAT in those precedents.

I consequently answer the issue posed herein above positively to the effect that the omissions complained of by the respondent are fatal to the application to the extent of rendering the application incompetent. This court thus lacks jurisdiction to entertain the application for the omissions.

For the finding I have just made herein above, which said finding is capable of disposing of the entire application I find myself relieved from discussing other arguments by the parties related to these same first two points of the PO. I am also relieved from considering the rest of the points of the PO since doing so will amount to a superfluous or academic exercise of kicking a died horse which is not the core purpose of the adjudication process.

I thus strike out the application with costs since in law costs follow event. It is so ordered.

JHK. UTAMWA

JUDGE

12/04/2014

12/04/2016

CORAM: Hon. Utamwa, J.
For Applicant; Mr. J. Byabato advocate
For Respondent;Mr. Musa Kassim
BC:Mr. Omari Mkongo (RMA).

Court: Rulingdelivered in the presence of Mr. Byabato learned counsel for the applicant and Mr. Musa learned advocate for the respondent this 12th day of April, 2016 in court.

J.H.K. UTAMWA

JUDGE.

12/04/2016