

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

MISC. CIVIL APPLICATION NO. 5 OF 2018

(Original from Civil Case No. 49/2016)

EXIM BANK (T) LIMITEDAPPLICANT

VERSUS

NURU BENEDICT SENGU RESPONDENT

RULING

MAIGE, J

By way of preliminary objection, the notice of which was earlier on filed, Mr. Mustapha Akonay, learned advocate for the respondent has questioned the maintainability of the application on two accounts. **First**, for failure to cite the specific enabling subsection of the law. **Two**, for being accompanied with a affidavit which is not properly verified.

The submissions of **Mr. Mustapha Akunay** in support of the first point of preliminary objection was very brief but precise. He contended that while the power of the Court to extend time for pursuit of an action is provided for in subsection 1 of section 14 of the Law of Limitation Act, in the chamber summons the applicant has cited the provision of section 14 of the **LLA** without specifying the specific subsection. The omission to cite a subsection, the counsel submitted, is a fatal irregularity which vitiates the proceedings. The counsel placed heavy reliance in among others, the authority of the Court of Appeal of Tanzania in **EDWARD BACHWA AND 3 OTHERS VS. THE ATTORNEY GENERAL AND ANOTHER, CIVIL APPLICATION NO. 128 OF 2006**. On the strength of the first ground of preliminary objection, the counsel urged me to strike out the application with costs.

In his submissions in rebuttal, **Mr. Daniel Lyimo**, learned advocate for the applicants, while admitting that subsection 1 of section 14 is that which confers power to the Court to extend time, it was his submissions that the omission to cite the relevant subsection was a curable defect which could be tolerated under article 107 A of the Constitution of the United Republic of Tanzania without occasioning any failure of justice. The counsel cited several authorities to support the proposition that in dispensing justice, the Court should give priority to substantive justice as against procedural technicality. Among the authorities referred was the decision of the Court of Appeal of Tanzania as per Mnuo, JR, as she then was, in **TANZANIA HOUSING CORPORATION VS. ETIENES HOTEL CIVIL**

APPLICATION NO. 10 OF 2005 where the provision of article 107A of the Constitution of the United Republic of Tanzania was judicially considered.

In anticipation of the defense under article 107A of the Constitution, **Mr. Akononay had**, in his submissions in chief, referred the Court to the authority in **CHINA HENAN INTERNATIONAL CO-OPERATION GROUP VS. SALVAND K.A. RWE GASIRA (2006) TLR, 220** where it was held that improper citation of an enabling provision was not a mere procedural technicality that would fall under article 107A of the Constitution.

From the submissions and counter submissions it seems to me, the issue is not whether or not the enabling provision of law has been correctly and properly cited but whether the omission to cite the relevant subsection is fatal. The Court of Appeal of Tanzania has answered that question affirmatively in **EDWARD BACHWA AND 3 OTHERS VS. THE ATTORNEY GENERAL AND ANOTHER, CIVIL APPLICATION NO. 128 OF 2006** where it stated as follows:-

...the answer is found in unbroken chain of authorities to the effect that wrong citation of the law, section, subsection and or paragraph of the law or non citation of the law will not move the Court to do what it is asked and renders the application incompetent.

I have taken time to study the authority **TANZANIA HOUSING CORPORATION VS. ETIENES HOTEL CIVIL APPLICATION NO. 10 OF 2005** relied upon by the counsel for the applicant. With great respect to the counsel, the said authority much as it was dealing with non-compliance of rule 52 (1) of the Tanzania Court of Appeal Rules, 1979, cannot justify any departure from the binding authority of the Court of Appeal of Tanzania which specifically deal with the effect of non citation of an enabling subsection.

The counsel cannot seek an asylum in the provision of article 107 A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 ("the Constitution") since the same Court of Appeal has held from time to time that improper citation of an enabling provision of law is a fatal irregularity which cannot be ignored under the provision of article 107A of the Constitution. As for instance, in **CHINA HENAN INTERNATIONAL CO-OPERATION GROUP VS. SALVAND K.A. RWE GASIRA (2006) TLR, 220**, the Court of Appeal was of the firm opinion that improper citation of an enabling provision of law is not a mere procedural technicalities which can be tolerated under article 107A of the Constitution but rather it goes to improper exercise of jurisdiction.

For those reasons therefore, I find that this Court has not been properly moved. Accordingly therefore, the preliminary objection is sustained to the extent of the first point of preliminary objection. In the circumstance, I find it useless to consider the second limb of preliminary objection. In the final result, the application is hereby struck out with costs for being incompetent.

It is so ordered.

Right to appeal is duly explained.


I. MAIGE

JUDGE

25/09/2018

DATE 25.09.2018

Coram: Hon. Maige, Judge

For the applicant: Mr. Wilbert John, advocate

For the respondent: Miss. Fauzia Mustapha, learned advocate

Court: Ruling delivered: application struck out with costs.




I. MAIGE

JUDGE

25/09/2018