IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

AT BUKOBA

MISC. LAND CASE APPLICATION NO. 95/2016

(Arising from Land Appeal No. 15/2010 of High Court, Misc Land Application 37/2012)

VEDASTO PROTACE ..... APPLICANT

VERSUS

JOSEPH HELMAN ..... RESPONDENT

RULING

16/05/2018 & 13/07/2018

KAIRO,J

The Applicant Vedasto Protace filed a Chamber Summons under Section 51 of the Land Disputes Courts Act [**Cap 216 R.E. 2002**] Section 95 of the Civil Procedure Code [**Cap 33 R.E. 2002**] and section 14 (1) of the Law of Limitation Act [**Cap 89 R.E. 2002]** supported by an affidavit sworn by the Applicant, seeking for an extension of time within which to appeal to this court, costs of this application and any other order the court would deem just to grant.

Before the application could come for hearing, the respondent, through his advocate, Mr. Aaron Kabunga, filed a Notice of Preliminary Objection challenging the application on three grounds, namely:

1. This application is irredeemable incurable incompetent for being hinged on wrong provisions of law which do not confer or vest jurisdiction to this court to hear and determine the application.
2. This Application is irredeemably incurably incompetent for being filed in unknown court registry.
3. This deponent was not identified or introduced to the Commissioner for oath who administering the oath and thus offending the law.

In the event, and as a consequence, the Respondent prays the court to dismiss this application with costs.

The parties agreed to dispose this preliminary objection by way of written submissions and leave to that effect was granted. The Applicant is self represented while Mr Frank Karoli of Kabunga & Associates Advocates of Bukoba represented the Respondent.

In his submissions Mr. Frank Karoli submitted that it is now a settled law that improper citation or non citation of an enabling provisions to an application is fatal as it makes the court not to be properly to hear and grant the application. Mr Frank went on to submit that the effect of non citation

or improper citation is to struck out the application. He cited the case of *CHINA HENAN INTERNATIONAL CO-OPERATION GROUP VS SALVAND K.A. RWEGASIRA [2006] T.L.R. 220* wherein it was held that non citation or improper citation of law is not a legal technicality curable under Article 107 (2) (e) of the Constitution of the United Republic of Tanzania but a statutory legal requirement which must be complied with.

Mr. Frank contended further that the applicant has cited a number of provisions of various laws without citing a proper and enabling provision of the law to warrant the court grant the prayers sought in the chamber summons. He stated that, section 51 of the Land Disputes Courts Act, Cap 216 R.E. 2002 and Section 95 of the Civil procedure Code, Cap 33 RE 2002 does not apply to the circumstances of this application due to the fact that S. 95 of Cap 33 does not apply when there is a specific provision of the law. He referred this court to the case of *OYSTERBAY PROPERTIES LTD VS KINONDONI MUNICIPAL COUNCIL & OTHERS, CIVIL REVISION NO. 4/2011, CAT AT DAR ES SALAAAM (UNREPORTED)* where the court at page 12-13 held that Section 95 of the CPC is a general provision which is usually invoked where there is no specific provision to cater for a particular situation.

The learned advocate further submitted that Section 51 of the Land Disputes Courts Act is not an enabling provision but the section directs the party to invoke any other law if there is lacuna in that Act.

He went on to submit that, the proper section to move the court was supposed to be section 14 (1) of the Law of Limitation Act, [Cap 89 RE 2002], but it is not the duty of the court to select which among the cited provisions should be invoked to determine the application since some of them are totally inapplicable, added the Advocate. He had a case of *DIDAS KAGIRWA VS MINISTER FOR LABOUR & 2 OTHERS, MISC. CIVIL CAUSE NO. 4/2008, H/C AT BUKOBA (UNREPORTED)* where it was said that it is not the duty of the court to venture into an exercise of separating the chaff from the grain, rather a party seeking a relief in court is the one casted with the legal duty to move the court with proper provisions of the law where the court can seize jurisdiction to hear and consider the application.

On the second limb of objection, Mr. Frank submitted that the application was filed in a wrong court registry and in great contravention of the High Court Registries Rules, 2005. He invited this court to consider rule 8 (2) of High Court Registries Rules, 2005 which provides thus:

> *"When any cause or matter, whether original or appellate, has been entered in any District Registry, it shall be entered:-*
>
> ***"IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA" IN THE DISTRICT REGISTRY AT ....."".***

He further submitted that the application filed by the applicant was filed in the registry known as *IN THE HIGH COURT OF TANZANIA BUKOBA REGISTRY* which is unknown and it has been settled law that proceedings filed in

unknown registry makes them not properly before the court as it was stated in the case of *LUKILILE M.A. VS LUDHA INDUTRIES LTD, CIVIL APPEAL NO. 278/2004, HIGH COURT OF TANZANIA AT DAR ES SALAAM (UNREPORTED).*

On the third limb of objection, it is the argument of Mr. Frank that the applicant's affidavit is defective as it does not show whether the Commissioner for Oath knew the deponent personally or was introduced to him. He said this is contrary to section 10 of the Oaths (Judicial Proceedings) and Statutory Declarations Act. He was fortified with the decisions in the case of *SIMPLISIUS FELIX KIJUU ISSAKA VS NBC LTS, CIVIL APPLICATION NO. 24/2003, CAT AT DAR ES SALAAM (UNREPORTED*) where the court held that:

> *"The affidavit does not show whether the commissioner for oath knew the applicant personally or whether the applicant was identified to him by somebody whom the commissioner for oaths personally, this is contrary to the requirement of section 10 of the Oaths (Judicial Proceedings) and Statutory Declarations Act".*

Under such circumstances, he maintained that it is evident that the applicant's affidavit in support of the application is defective and should be struck out with costs.

In response, the applicant adamantly countered the submission by the learned advocate, Mr. Frank regarding the improper citation of the provision of the law, he argued that section 51 of the Land Disputes Courts Act and Section 95 of the Civil Procedure Code and Section 14 (1) of the Law of

Limitation Act are proper to be used to move the court. He further argued that in the cited case of *Oysterbay Properties Ltd versus Kinondoni Municipal Council and others*, the court held at page 12-13 that section 95 of the CPC is a general provision which is usually invoked where there is no specific provision to cover a particular situation. He went on that, this does not bar the Applicant to use section 95 of CPC together with section 14(1) of the Law of Limitation Act. In additional, he stated that section 51 of the Land Disputes Court Act directs the party to invoke any other laws if there is a need to use a certain law and not where there is lacuna as stated by the respondent.

Regarding the use of chamber summons, chamber application and affidavit, the Applicant was of the view that the only place where the parties can crave his/ her prayer is through chamber application. However, the applicability of Order XLIII rule 2 of CPC requires every application to court to be made under this Code, unless otherwise provided, to be made by a chamber summons supported by affidavit. The chamber summons is used to summon the parties to appear before the court and not for prayer.

With regards to the 2nd and 3rd limbs of preliminary objection, it was his further argument that there are legal technicalities which are hand maid of justice and should not be used to defeat justice. He finds support from Article 10 of the Constitution of the United Republic of Tanzania. He also cited a case of *CROPPER VS SMITH (1884) 26 CL.D 700 AT PAGE 710* WHERE it was held that *"the object of the court is to decide the right of the parties*

and not to punish for mistake they made in the conduct of their cases by deciding otherwise than in accordance with their right, know of no kind of error or mistake which if not fraudulent or intended to overreach, the court ought to correct, if it can be done without injustice to the other party". He further cited the case of *GENERAL MARKETING CO. LTD VS A.A. SHARIFF (1980) TLR 61 at page 65* where Biron,J (as he then was) held that *rules of procedure is handmaids of justice and should not be used to defeat justice.*

He lastly submitted that the objections by the respondent's counsel have no merit hence be dismissed with costs.

I have carefully considered the submissions by both parties. The issue for determination is whether or not the POs raised are sustainable. The first material ground of the preliminary objection was that this application is incurably incompetent for being hinged on wrong provisions of law which do not confer jurisdiction to this court to hear and determine the application. The application at hand is made under section 51 of the Land Disputes Courts Act [**Cap 216 R.E. 2002**], Section 95 of the Civil Procedure Code [**Cap 33 R.E. 2002**] and section 14 (1) of the Law of Limitation Act [**Cap 89 R.E. 2002]** for extension of time within which to lodge an appeal in this court. The concern is the applicability of these provisions to move the court. The applicant strongly argued that these provisions of law are proper to move the court. While the respondent's advocate contends that the application is not proper as it contains the various provisions hence, it is not the duty of

the court to select which among the cited provisions should be invoked to determine the application.

As indicated above, Section 51 of the Land Disputes Courts Act Cap 216 RE 2002 allows the High Court and District Land and Housing Tribunal to apply the Civil Procedure Code Cap 33 and the Evidence Act Cap 6. However, the applicant was of the view that it directs the party to invoke any other laws if there is a need to use a certain law. With due respect to the Applicant, Section 51 of Cap 216 RE 2002 allows the application of the Civil Procedure Code where there is a lacuna in Cap 216. Since the CPC does not provide the limitation period to file appeal or application, then the Law of Limitation Act Cap 89 RE 2002 comes into play. Having in mind that the application in hand is for application of time within which to file the appeal, the applicant ought to apply under section 14 (1) of the Law of Limitation Act Cap 89 RE 2002]. Further to that, section 95 of the CPC is a general provision which is usually invoked where there is no specific provision to cover a particular situation. I am so fortified with the holding in the case of **OYSTERBAY PROPERTIES LTD VS KINONDONI MUNICIPAL COUNCIL & OTHERS, CIVIL REVISION NO. 4/2011, CAT AT DAR ES SALAAAM (UNREPORTED)** where the court at page 12-13 held inter alia that:-

> *"Section 95 of the CPC is a general provision which is usually invoked where there is no specific provision to cover a particular situation".*

Since there is Law of Limitation Act [Cap 89 R.E. 2002] to cover the situation, therefore, I find that the applicant was supposed to apply section 14 (1) of Cap 89 as correctly submitted by the learned counsel for the respondent. Though the other cited provisions of the law are inapplicable, the application has been saved by the citing of 14 (1) of Cap 89 which is proper to move the court to grant the prayer sought.

It is contended in the second ground of objection that this Application is irredeemably incurably incompetent for being filed in unknown court registry. Mr. Frank's firm view was that the application does not conform to the requirement of rule 8 (2) of High Court Registries Rules, 2005. The rule requires the application or appeal to the High Court to be entered as:-

> ***"IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA" IN THE DISTRICT REGISTRY AT ……."".***

The Advocated stated that, the application was filed "*IN THE HIGH COURT OF TANZANIA AT BUKOBA*" which is unknown registry hence not proper before this court. The Applicant on his part was of the view that the rules of procedure are handmaids of justice and should not be used to defeat justice. He invited this court to hold the same view as was held in the case of *GENERAL MARKETING CO. LTD VS A.A. SHARIFF (1980) TLR 61.*

Having considered the rival arguments, I am of the view that the pointed out flaw is not fatal to render the application incompetent as argued by Advocate Frank. In my understanding, once one mentions Tanzania,

automatically it denotes the United Republic even if the words *United Republic* weren't mentioned. This is because Tanzania is the result of the union of Tanganyika and Zanzibar. Further, to my understanding there is no distinction of writing *"Bukoba Registry"* and *"In the District At Registry at Bukoba"* as the former is in short form and the latter is in a long form. I thus see no merit on this P.O

Regarding the third limb of the objection, it was contended that this deponent was not identified or introduced to the Commissioner for oath who administering the oath and thus offending the law.

I equally agree with the learned advocate for the Respondent on this point of law. It is a procedural requirement that affect affidavit of the applicant if the Jurat of attestation does not conform to the requirement of section 10 of the Oath and Statutory Declarations Act, [Cap 12 Re 2002].

Mr. Frank, learned counsel invited this court to hold as was held in the decision in the case of *SIMPLISIUS FELIX KIJUU ISSAKA VS NBC LTS, (supra).* There are number of authorities of the Court of Appeal of Tanzania that hold the same view with regards to the affidavit that does not show whether the commissioner for oath knew the applicant personally or whether the applicant was identified to him by somebody who is known to the commissioner for oaths personally. The omission is contrary to the requirement of section 10 of the Oaths (Judicial Proceedings) and Statutory Declarations Act". The person signing the document must do so and appear

before the Notary Public and/ or Commissioner for Oaths as required by section 10 of the Act. In the present application, it was not indicated in the *jurat of attestation* as to whether the deponent was identified by a person known to the commissioner for oath or is known to the commissioner for oath personally as rightly argued by the learned advocate for the Respondent. As section 10 of the Act is coached in mandatory terms, failure to comply with it is fatal. [See: *COMMISSIONER GENERAL (TRA) VS. PAN AFRICAN ENERGY (T) LIMITED, CIVIL APPLICATION NO. 277/20 OF 2017, CAT DAR ES SALAAM (unreported)].*

I am alive that the Applicant urged this court to invoke the provisions of Article 107A (2) of the Constitution of the United Republic of Tanzania so as to allow the application without being bound by legal technicalities which are hand maid of justice, and therefore, should not be used to defeat justice. In the case of **ZUBERI MUSSA VS. SHINYANGA TOWN COUNCIL, CIVIL APPLICATION NO. 100 OF 2004 (UNREPORTED) CAT MWANZA** cited with approval in the case of **COMMISSIONER GENERAL (TRA) VS. PAN AFRICAN ENERGY (T) LIMITED, CIVIL APPLICATION NO. 277/20 OF 2017**, (supra) it was held that:

> *"Article 107A (2) (e) is so couched that in itself is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for Court action and not as iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to*

enhance the quality of justice delivered.... One cannot be said to be acting wrongly or unreasonably when he is executing the dictates of law".

From the above authorities, it needs no further emphasis that the rule of procedures are very crucial in administration of justice hence failure to indicate in the *Jurat of attestation* whether the deponent was personally known to the commissioner for oath or was identified to him by a person known to him is fatal. It goes that the affidavit is fatally defective for lacking proper *Jurat of attestation*. Consequently, the same cannot support the chamber application, which means the application has no legs to stand on. The only remedy is to struck it out as I hereby do.

For the reasons afore stated, it is my finding that the third PO is sustained but rejects the 1st and 2nd PO. All in all this application is struck out for want of proper attestation, with costs. However the Appellant can file it again after correcting the observed flaws if he still so wish.

It is so ordered.

HIGH COURT OF TANZANIA BUKOBA

L. G. Kairo.

Judge

At Bukoba

13/7/2018.

Date: 13/07/2018

Coram: Hon. L.G. Kairo, J.

Applicant: Present in person

Respondent: Absent, Frank John Advocate

B/C: R. Bamporiki

Advocate F. John Karoli: Hon. Judge, the matter is for ruling. We are ready to receive the same.

Applicant: I am also ready to receive the same.

Court: The case is scheduled for ruling. The same is ready and read over before the parties in the presence of the Applicant and Advocate F. John Karoli who is representing the Respondent in open court.

L.G. Kairo

Judge

12/07/2018