

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

**MISCELLANEOUS CIVIL APPLICATION NO. 158 OF 2017
(Arising from the decision of the Temeke District Court in
Civil Appeal No. 93 of 2016)**

ZALIA SALMIN JAHA.....APPLICANT

Versus

HAMAD HAMAD MATONELA.....RESPONDENT

RULING

B.R. MUTUNGI, J:

The applicant herein who is enjoying the legal services of the Tanzania Women Lawyers' Association (TAWLA) is seeking for the following prayers;

- 1. This honourable may be pleased to extend time within which the Applicant can file an Appeal out of time from the decision of the District Court of Temeke on 19/1/2017.*
- 2. Any other orders (s) this Honourable Court may deem fit and just to grant.*

The applicant had attempted to move the court under section 14 of the Law of Limitation Act [Cap. 89 R.E 2002], section 5 (1) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E 2002] and Rule 45 (a) of the Court of Appeal Rules, 2009 as well as section 95 of the Civil Procedure Code [Cap. 33 R.E 2002]. The application is also supported by an Affidavit sworn by the applicant.

On the other side of the coin, the respondent apart from filing his counter affidavit against the application, has further raised a preliminary objection on the following aspects;

- 1. The application is bad in law for non-citation of the proper provision of law to move the court.*
- 2. The application is incompetent for being accompanied with the incurable defects in the verification of the affidavit.*

On 12/3/2018 when the matter was called for hearing the preliminary objection, the court ordered the same be

disposed of by way of written submissions. It is noted the parties did file their respective submissions within the prescribed time.

The respondent submitting on the first limb of the preliminary objection stated, the matter had originated from the Primary Court. He was of the view the appropriate provision of the law is **section 25 (1) (b) of the Magistrate Court Act [Cap. 11 R.E 2002]** and **Rule 3 of the Civil Procedure (Appeals in Proceedings Originating from Primary Court) Rules, GN 174 of 1974.**

Basically, the respondent argued the cited provisions of the law are not applicable herein. He referred this court to the cases of **Charles Francis Nshageki Versus Hamidu Salehe Kungule, Commercial Case No. 17 of 2012, HC (Unreported); Mwindandi Ally Mawila Versus Issa Ally Shunda, Commercial Case No. 91 of 2009 HC (Unreported)** and **Mbeya Cement Company Limited Versus Agness**

Charles Kiango, Commercial Case No. 45 of 2008 HC (Unreported).

The respondent prayed the application be struck out for incompetence with costs. He went further and referred this Court to the cases of **Chama cha Walimu Tanzania Versus The Attorney General, Civil Application No. 151 of 2008 (CAT-UNREPORTED); National Bank of Commerce Versus Sadrudin Meghji [1998] TLR 503; Almas Iddie Mwinyi Versus National Bank of Commerce and Another [2001] TLR 83; China Henan International Cooperation Group Versus Salvand K.A Rwegasira [2006] TLR 220 and Total Tanzania Limited Versus Zenon Oil and Gas, Miscellaneous Commercial Cause No. 219 of 2015 (HC-Unreported).**

In reply, the applicant appeared to concede to the raised preliminary objection. She subsequently prayed to withdraw the application with leave to re-file under **Order XXIII Rule 1 (1) and (2) of the Civil Procedure Code (supra).**

The applicant further urged the court to consider Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania, 1977.

The issue is whether the raised preliminary objection has merits or otherwise.

From the outset, I agree with both camps that the court has not been properly moved. The applicant had cited wrong provisions of the law. The reason as rightly submitted by the respondent, the matter at hand had originated from the Primary Court. Thus, the appropriate enabling provisions are section 25 (1) (b) of the Magistrate Courts Act (supra) and Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules (supra).

What remains to be considered would be, what then is the outcome in the given circumstances, whether the application be marked withdrawn with the leave to refile a

proper one as suggested by the applicant or be stuck out for being incompetent as amplified by the respondent.

It is trite law that, wrong citation of the law renders the application incompetent. This stance has been proclaimed in the case of **EDWARD BACHWA AND 3 OTHERS VERSUS THE ATTORNEY GENERAL AND ANOTHER, CIVIL APPLICATION NO. 128 OF 2006 (CAT-DSM) (UNREPORTED)** at page 7 where the Court of Appeal held;

'...wrong citation of the law, section, sub-sections and/ or paragraphs 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.'

In a similar vein, in the case of **CHINA HENAN INTERNATIONAL CO-OPERATION GROUP VERSUS SALVAND K.A RWE GASIRA, CIVIL REFERENCE NO. 22 OF 2005 (CAT-DSM) (UNREPORTED)** at page 5 the Court cited with approval the case of **ALOYCE MSELLE VERSUS THE**

CONSOLIDATED HOLDING CORPORATION, CIVIL APPLICATION NO. 11 OF 2002 (UNREPORTED) where it was held;

*"...there is an unbroken chain of authorities of this Court to the effect that wrong citation of a provision of law under which an application is made renders that application incompetent. Such decisions include: **NBC v Sadrudin Meghji**, Civil Application No. 20 of 1997, **Rukwa Autoparts Ltd v Iestina G. Mwakyoma**, Civil Application No. 45 of 2000; and **Citibank (T) Ltd. v TTC & Others**, Civil Application No. 65 of 2003"*

The foregoing notwithstanding, I totally disagree with the applicant's suggestion, since the Civil Procedure Code Cap 33 RE: 2002 does not apply herein. The reason being the matter has originated from the Primary Court. More so, Article 107 A (2) (e) of the Constitution has no room herein as suggested by the applicant. The reason is that, the applicant was supposed to comply with the rules of

procedure accordingly by moving the court properly. The same was well amplified in the case of **THOMAS DAVID KIRUMBUYO AND ANOTHER VERSUS TANZANIA TELECOMMUNICATION CO. LTD, CIVIL APPLICATION NO. 1 OF 2005 (CAT-DSM) (UNREPORTED)** at page 6 the Court of Appeal held;

*'...In order to ensure that the machinery of administering justice is not hampered, the court is **bound stringently**. There is no exception provided under the rules for a relaxed application when laymen are involved as is the case here. All the more so, when it involves noncompliance with the rules on aspect which go to the root, the consequences are fatal. ...I cannot therefore entertain the applicant's lenience in applying the rules upon the fact they are laymen.'*

As if not enough, in the case of **ABUBAKAR ALI HIMID VERSUS EDWARD NYELUSYE, CIVIL APPEAL NO. 70 OF 2010 (CAT-DSM) (UNREPORTED)** at page 10 the Court cited with

approval the case of **Zuberi Musa Versus Shinyanga Town Council, Civil Application No. 100 of 2004 (Unreported)** which stated;

*'...Article 107A (2) (e) is so couched that in itself it 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 an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed held to enhance the quality of justice. It recognizes the importance of such rules in the orderly and predictable administration of justice....'***

In the event, I find the application at hand incompetent, consequently it is accordingly struck out. On the same footing I need not venture into the second limb. I further make no order for costs since the dispute revolves

around a matrimonial matter, in which parties had a close relationship.

It is so ordered.


B.R. MUTUNGI

JUDGE

7/5/2018

Right of Appeal Explained.


B.R. MUTUNGI

JUDGE

7/5/2018

Read this day of 7/5/2018 in presence of the applicant and Mariam Shelimo for the respondent.


B.R. MUTUNGI

JUDGE

7/5/2018