IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION NO. 152 OF 2019

(Arising from PC Civil Appeal No. 37 of 2018 which originated from Bupandwa Primary Court, Civil Case No. 27 of 2017)

WILFRED JOHN.....APPLICANT

VERSUS

PAULO KAZUNGU.....RESPONDENT

RULING

26th May, & 06th July, 2020.

TIGANGA, J.

This is a ruling on a preliminary objection, taken at the instance of the respondent, to the effect that this application is defective on the following grounds;

1. *That this application is misconceived and bad in law for being filed under the wrong provisions of the law.*
2. *That the affidavit is incurably defective for offending Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33 R.E 2002.*

This court ordered that the objection be argued by way of written submission to which the parties complied. The applicant was represented by the learned counsel Mr. Felix James whereas the respondent enjoyed the services of Mr. Eric Katemi, learned counsel.

Arguing in support of the first limb of preliminary objection, the respondent through his counsel argued that the applicant being aggrieved by the decision in PC Civil Appeal No. 31/2017 filed an appeal in this court, PC Civil Appeal No. 37/2018, which when called for hearing he failed to appear leading to the dismissal under Rule 13(2) of the Civil Procedure (Appeals originating from primary Courts) Rules GN No. 312 of 1964. The applicant has moved this court under the provisions of Order IX Rule 9, Order XLIII Rule 2, and section 95 of the Civil Procedure Code, Cap 33 R.E 2002.

He argued that these provisions are inapplicable in the instant application because they can only be used when the suit was filed in the original court and the plaintiff fails to appear. He contended that the applicant was supposed to move this court under Rule 17 of GN No. 312 (supra) in which he was to apply for re-admission of the dismissed appeal and not to set aside. He therefore urged that the first preliminary objection be sustained and the application be struck out for being brought under the wrong provision of the law.

On the second limb of preliminary objection, he contended that paragraphs 3, 4, 5 and 6 of the affidavit in support of the application, sworn by the applicant's counsel, are in contravention of Order XIX Rule 3(1) of the Civil Procedure Code (supra). This is because the counsel deposed on the information he received from his client relating to transport issues and the old age of his client but failed to indicate in the verification clause. This infringement, the respondent argues, renders the affidavit incurably defective, hence should be struck out.

The respondent also argued regarding the use of section 95 of the Civil Procedure Code (supra) stating that the section can be applied generally when the court decides to use its inherent powers when there are no specific provisions applicable. He then concluded that the preliminary objection has merits and so the application be struck out for the reasons stated above.

Arguing against the raised preliminary objection, the counsel for the applicant stated regarding the first limb of objection that, moving the court with improper provision is a curable defect which does not go to the root of the application. He stated further that whenever there is a defect that does not harm the roots of the case, then that case should go to its merits in order to secure the substantive part of the case. He also further stated that, that since the court has jurisdiction to grant what is sought before it, it should do so regardless the improper citation.

He cited the case of **Yakobo Magoiga Gichere vs Penina Yusuph**, Civil Appeal No.55 of 2017 CA and that of **Alliance One Tobbacco Tanzania Limited and Hamisi Shoni vs Mwajuma Hamis,** (the administratrix of the estate of Philimoni R Kilenyi), Miscellaneous Application No. 803 HC (both unreported) to that effect.

Regarding the second limb of preliminary objection, the counsel for the applicant contended that, there was no failure on his part to indicate in the verification clause, the information he received from his client. What he deposed was the information he had personal knowledge of. Thus it cannot be stated that the provisions of Order XIX Rule 3(1) of the Civil Procedure Code (supra) have been infringed.

He concluded his submission by urging this court to allow the application for the purpose of ensuring that the substantial justice is well achieved and also prayed to be allowed to amend the wrongly cited provisions and substitute them with the relevant ones.

From the submissions by the parties to this application, and from the raised preliminary objection, the question that I suppose has to be considered is whether this court has been properly moved.

As already stated above in the submission by the respondent, he contended that the applicant has wrongly moved this court by citing the wrong provisions of the law. He argued that Order IX Rule 9, Order XLIII Rule 2 and section 95 of the Civil Procedure Code (supra) have been wrongly cited as enablers of this instant application. The applicant has conceded in his submission that the provisions he cited as enablers were wrongly cited. However he was of the firm view that citing the wrong provision is a curable defect since it does not go to the root of the application. He prayed that he be allowed to change and insert the right provisions.

I must say that the law regarding this matter is well settled. It is to the effect that the wrong citation as well as the non citation of the enabling provisions renders the application incompetent. This has been stated in a number of decided cases when the court was faced with similar circumstances as this one at hand. For instance in the case of **Hussein Mgonja versus The Trustees of the Tanzania Episcopal Conference**, Civil Revision No.02 of 2002, CA (unreported), the Court of Appeal when striking out an application on the ground of incompetence stated that;

"If a party cites the wrong provision of the law, the matter becomes incompetent as the court will not have been properly moved"

Also see, **Edward Bachwa & Three Others vs The Attorney General & Another**, Civil Application No.128 of 2006.

The applicant herein moved this court by citing Order IX Rule 9, Order XLIII Rule 2 and section 95 of the Civil Procedure Code (supra) as enabling provisions to set aside the dismissal order, however, it is clear and from his own concession that the cited provisions are irrelevant hence amounts to wrong citation.

Appeals from Primary courts are governed by the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules GN No. 312 of 1964, specifically rule 17 therein bellow which provides for re-admission of appeal dismissed for default. It states and I quote;

"where an appeal has been dismissed under sub rule (2) of 13 in default of appearance by the appellant, he or his agent may apply to the appellate court for the re-admission of the appeal; and if the court is satisfied that he was prevented by any sufficient cause from appearing either personally or by agent when the appeal was called on for hearing it may re-admit the appeal on such terms as to costs or otherwise as it thinks fit"

The records show that the appeal was dismissed under rule 13 (2) of GN No. 312 of 1964 (supra), therefore, as was rightly contended by the counsel for the respondent, and as far as the above quoted rule

goes, the applicant was supposed to apply for re-admission of the dismissed appeal under rule 17 of the GN No. 312 (supra) as an enabler provision. It can therefore be concluded without any doubt that this court has not been properly moved.

Having discussed as above, the question that arises at this stage is whether, having ruled that the court has not been properly moved, this application is competent. As already stated above, the applicant has cited the wrong provisions of the law in moving this court to grant him the prayers sought in the chamber summons. As was stated in the case of **Hussein Mgonja** (supra) that if a party cites the wrong provision of the law, the matter becomes incompetent, it follows that this application is also incompetent for it has been filed under the wrong provisions of the law.

Although the applicant has urged this court to invoke the oxygen principle and focus on the substantive part of the matter stating that the wrong citation does not go to the root of the matter, this court, with due respect, does not share the same view. The gravity of the error in citing a wrong enabling provision was stated by the Court of Appeal in the case of **China Henan International Co-operation Group versus Salvand K. A. Rwegasira**, [2006] TLR 220, where the court held that;

> *"here the omission in citing the proper provision of the rule relating to a reference and worse still error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107A(2) (e) of the Constitution. It is a matter which goes to the very root of the matter"*

With the above quoted principle, this court concludes that the wrong citation does go to the root of the matter and since this application has been preferred under the wrong provisions it is therefore based on the wrong legal foundation hence bound to collapse.

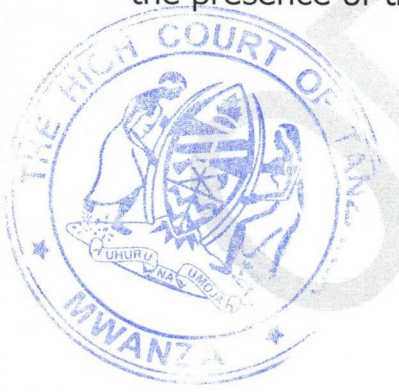
Having discussed as above, I hold that the first limb of objection regarding the wrong citation of the enabling provision is meritorious and it is therefore sustained. Since this objection alone suffices to dispose of the application, I hereby do the same by striking it out with costs.

It is so ordered,

DATED at **MWANZA** this 06th day of July, 2020

J. C. Tiganga
Judge
06/07/2020

Ruling delivered in open chambers in the presence of the parties in the presence of the parties as per coram.



J. C. Tiganga

Judge

06/07/2020