

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

MISC. LAND APPLICATION No. 29 OF 2020

(Arising from the Judgement of HC Land Appeal No. 37/2013)

ABDALLA OMARYAPPLICANT

VERSUS

SERIKALI YA KIJIKI CHA MWANZA BULIGA.....RESPONDENT

RULING

20th August, & 12th October, 2020

TIGANGA, J

Mr. Abdallah Omary (the Administrator of the Estate of the late Hassan Biganio), hereinafter referred to as the applicant, applies before this court for three orders, namely;

1. Extension of time in determining the application for leave to appeal to the Court of Appeal of Tanzania against the judgment and decree dated 23rd February 2016, passed in Land Appeal No. 37/2013.
2. The applicant to grant leave for the applicant to appeal to the Court of Appeal of Tanzania against the judgment and decree dated 23rd February, 2016 in Land Appeal No. 37/2013.
3. The costs of this application be provided for.

Before going to the merit of the application, I feel it important to point out the historical background, *albeit* briefly for easy reference and understanding of this matter.

The history of this matter traces way back in the year 2012 when the late Hassan Biganio instituted Land Application No. 10/2012 before the District Land and Housing Tribunal for Mara at Musoma. In that application he claimed an order declaring him to be the lawful owner of a suit land which is located in Mwanzabuliga village by then in Musoma District, but now in Butiama District.

On 22nd day of March 2013, he was declared the rightful owner of the suit land and awarded him a total sum of Tshs. 22,225,000/= being the general damage. That resulted into an appeal before the High Court in Land Appeal No. 37 of 2013, in which the proceedings judgment and decree of the trial tribunal was set aside. That was on 23rd February, 2016.

Being dissatisfied by the decision of the High Court Mr. Hassan Biganio lodged a Notice of Appeal to the Court of Appeal of Tanzania, on 07th March 2016, and filed Misc. Land Application No. 30/2016 seeking for leave to appeal to the Court of Appeal of Tanzania, but the same was withdrawn on 09th May 2019, with liberty to re file.

Exercising that liberty, the applicant filed Misc. Application No. 171/2019 for leave to appeal to the Court of Appeal, but the same was withdrawn on 19th May 2020, with leave to re file in the names of the Administrator following the demise of the applicant hence the present application.

These facts form a substantive part of the affidavit affirmed by Mr. Abdallah Omary, the administrator. In paragraph 8 and 9 of the said Affidavit, he deposed that counting from when Land Application No. 30/2016 was filed up to when it was withdrawn with leave to re file there was pending proceedings over the same subject matter, he asked the court to term this period as a technical delay.

He deposed further that there are chances of success in the application if the prayer for extension of time is granted, because of the overwhelming of chances set out in paragraph 11 of this application.

In paragraph 11, he pointed out two points of law under which the application may be granted.

- a) Whether there was improper evaluation of evidence by the High Court causing miscarriage of justice to the detrimental of the applicant.
- b) Whether there was improper admission of exhibits by the trial tribunal leading to violation of the provision of the law.

The applicant prayed that, in the interest of justice and in order to avail the applicant's right to be heard to the Court of Appeal, it will be fair and just if the applicant's prayers will be granted. When the respondent filed the counter affidavit, sworn and filed by are Bwire Mnasa Kaitira, the village chairman of the respondent, he accompanied it with a Notice of Preliminary Objection which contained four points, as follows;

- a) That the applications bad in law for being omnibus.

- b) That the court has been not properly moved.
- c) That the application is an abuse of legal process.
- d) That the application is bad in law for being accompanied with defective Affidavit.

Both parties were represented by learned counsel, while the applicant was represented by Mr. Katemi Erick, Advocate, the respondent was represented by Mr. Benard Misalaba, Advocate.

With leave of the court, the preliminary objection was argued by written submissions. Following that leave, counsel filed their respective submission as ordered. In support of the first ground of preliminary objection, the counsel submitted that the application is bad in law for being omnibus for seeking two reliefs under different provision of the law.

He submitted further that the second point of objection depends upon the first point. On the second point of objection that the court has not been properly moved, as it cited section 14 of the Law of Limitations Act Cap 89 R.E 2009 and section 47 (1) of the Land Disputes Courts Act Cap 216 R.E 2009 which are non existing law in Tanzania.

It was his submission that the application is incompetent before the court. Arguing in support of the 3rd point of preliminary objection, which is to the effect that, the application is nothing but an abuse of legal process.

The counsel for the respondent contends that there are several applications filed in the defective form, he mentioned those application to be Misc. Application No. 30/2016, which was dismissed on 04/09/2018,

Misc. Civil Application No. 170/2018 which was withdrawn on 09/05/2019, Misc. Application No. 78/2019 withdrawn on 10/10/2019, and Misc. Application No. 177/2019 which was also withdrawn.

He submitted that, the trend of filing and withdrawing his application is an indication that the applicant is not serious but he is rather keeping the court busy unnecessarily. To support his contention, he submitted that, the administrator was appointed on 23/10/2019; however, when the applicant was filing Misc. Application No. 177/2019 was after the administrator has been appointed on 18/12/2019. This means, the court has been kept busy for nothing for four years and five month counting from 23/02/2016.

On fourth ground, it is sufficient to indicate that the affidavit indicates lack of seriousness on part of the applicant, in that, the deponent is indicated as the affirmant, no indication of the drawer and to whom the affidavit is going to be served. He in the end prayed the application to be dismissed.

In reply, the applicant started by attacking the submission in respect of the first ground of objection that, the respondent counsel cited no law nor decision to bolster his point.

In effect, he admitted the fact that the chamber summons presented two prayers in the same application, he submitted, however, that there is no law that forbid omnibus application, as held in the case of **Shida Simeo vs Samwel Bwire**, Misc. Land Application No. 07/2020 HC Musoma, that for application, with two or more prayers which are related,

can be combined for the sake of conveniences and saving time of the Court in dealing with numerous applications.

Further to that, he also cited the authority in the case of **Tanzania Knight wear Limited vs Shamsu Esmail** [1989] TLR 48, in which it was held that,

"The combination of two applications in one is not bad in law since court of law abhor multiplicity of proceedings".

He submitted that since the application for extension of time for leave and application for leave to appeal to the Court of Appeal are related as they requires reason which have been elaborated in a single affidavit then to united them in the same chamber summons is allowable, hence the preliminary objection has no merit and the same should be overruled.

With regard to the second point of objection, he submitted by conceding that the applicant cited Cap 89 R.E 2009 and Cap 216 R.E 2009, instead of R.E 2019. He submitted that they wanted to cite RE 2019 but by the slip of pen and typing error accidentally cited R.E 2009. He submitted however that citing R.E 2009 instead of R.E 2019 is not fatal making the entire application fail, as the relevant provision of the law have been cited and appears in chamber summons. He submitted that the same is curable under overriding objective principle introduced in our jurisdiction by the Written Laws (Misc Amendments Act No. 03/2018). On that ground he prayed that the preliminary objection in the 2nd ground be overruled.

Regarding the 3rd and 4th points of objection, he submitted that these do not qualify to be pure point of law as it was held in the case of **Mukisa Busquit Manufacturing Company Limited Vs West end Distributors Limited**, [1969] EA 696. He prayed that the application to be dismissed with costs.

In rejoinder, the counsel for the respondent distinguished the decision of **Shida Simeo Vs Samwel Bwire** (supra), with the case at hand. Regarding the 2nd point of objection, he submitted that it has been acceded. He submitted that overriding objective is not a medicine of every ill.

Also that the affidavit lacks names and address of the drawer and a person to be served, he asked for the application to be dismissed. He submitted that the 4th point of objection, is in violation of section 44 (2) of the Advocate Act [Cap 341 RE 2019]. He in the end submitted that the application be dismissed with costs.

Now, having summarised at length, the contents of the application as well as the submission by both counsel, I will for easy flow of the ideas start with the 3rd and 4th points of objection. These points were challenged by the counsel for the applicant as having no quality to be referred as the preliminary objection as enunciated by the authority in **Mukisa Buscuit Company Limited vs West End Distributors Limited** (supra).

It is the principle of law that for a point raised to qualify as the point of Preliminary Objection, it must be a pure point of law.

The two points Preliminary Objection, with all due respect to the counsel for the respondent, the two points of objection in the 3rd and 4th points objection, lacks quality to be the preliminary objection as they alleges that the application at hand is an abuse of the legal process, and that affidavit is defective. In my considered view, these points raise issues of facts which need to be proved by evidence; therefore these are not purely point of law. The two points, the 3rd and 4th Preliminary Objection are overruled for the reasons given.

Now, regarding the 2nd point of preliminary objection, that, the applicant moved the court under sections 14 of the Law of Limitations Act Cap 89 R.E 2009, and section 47 (1) of the Land Dispute Courts Act, Cap 216 R.E 2009, which laws are non existing. The counsel for the applicant admitted to have committed what he calls a typing error in which he wrote R.E 2009, instead of RE 2019, and asked that error to be cured by the principle of overriding objective as introduced by Written Laws (Misc. Amendment) Act No. 3 of 2018.

On this kind of the preliminary objection the position of the law is very clear, the Court of Appeal of Tanzania, in a number of cases decided by it, has on several occasion held that, improper citation, or non citation of the enabling provision or, citation on non existing law, or citation of the non specific provision of the law renders the application incompetent, and therefore deserves to be struck out. This position is in the decision of the Court of Appeal of Tanzania in **Thomas William Olakwi vs The Republic**, Criminal Application No. 04/2012, decided on 09/08/2017. In that decision, a number of decisions were cited and relied upon, to mention

but few are, **China Henan International Co - operative Group vs Salvand K. A Rwegasira** [2007] TLR 220, **Anthony J, Tesha Vs Anitha Tesha**, Civil Appeal No. 10 of 2003, **Aloyce Mselle Vs The Consolidated Holding Corporation**, Civil Appeal No. 11 of 2002, **Citi Bank Tanzania Limite Vs Tanzania Telecommunication Limited and others**, Civil Application No. 65 of 2003, **Edward Bachwa and Others Vs The A.G and Another**, Civil Application No. 128 of 2006 and **Omary Makujaa Vs The Republic**, Criminal Application No. 22/2014.

In this case, the applicant cited R.E 2009; he said it was an error in typing, as the proper version was supposed to R.E 2019. I agree that, it may be a mistake, but what we have on record is that the application was preferred under the law styled as, R.E 2009 which is a non existing one, the [R.E 2019] remained in his mind, and therefore the proper edition, cannot be said to have cited and moved the court in this matter.

The applicant asked for the application to be saved by overriding objection, on this the authority in the case of **Mondorosi Village Counsel, and Others vs Tanzania Breweries Ltd and Others**, Civil Appeal No.66 of 2017 CAT (unreported) in which it was ruled that;

"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provision of the procedural law, which go to the very foundation of the case".

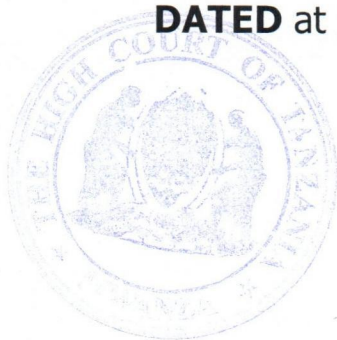
In my considered view, the provision of the law upon which the court is moved is a foundation of the jurisdiction of the court in the particular case.

Non citing, or citing the wrong or a non existing one, is not a matter of technicality envisaged by the provision of the Written Laws (Misc. Amendment) Act, No. 03 of 2018, it goes to the root of the matter, and for that reason to the jurisdiction of the court.

That said, I find, the objection on the second point of objection to have merit, and therefore it is upheld. Consequently this renders the application at hand incompetent and therefore, it deserves by that point alone, without even considering the rest, to be struck out. In the fine, the application at hand is hereby struck out with costs.

It is accordingly ordered.

DATED at MWANZA, this 12th day of October, 2020




J. C. Tiganga

Judge

12/10/ 2020

Ruling delivered in open chambers in the presence of Mr. Mshongi Advocate for the applicant and Mr. Msalaba, Advocate for the respondent.


J. C. Tiganga

Judge

12/10/ 2020