IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 29 OF 2021

(Arising from the Judgement of the High Court in PC Civil Appeal No. 129 of 2019, Mlacha J, dated 21/12/2020)

NURDIN MOHAMED CHINGO..... APPLICANT

VERSUS

SALUM SAID MTIWE .....1ST RESPONDENT

HADIJA SAID MTIWE .....2ND RESPONDENT

RULING

Date of last Order: 16/12/2021.

Date of Ruling: 04/02/2022.

E.E. KAKOLAKI, J

Before this court, by way of chamber summons supported by affidavit of one **Thadei Agathon Hyera**, applicant's advocate, the court is moved by the applicant for grant of two prayers of leave to appeal to the Court of Appeal and Certification that a point of law is involved in respect of the decision of this court, Mlacha, J in PC Civil Appeal No. 129 of 2019 dated 21/12/2020. The application which is preferred under sections 5(1)(c) and (2)(c) of the

Appellate Jurisdiction Act, [Cap. 141 R.E 2019] referred as AJA, has been vigorously resisted by the respondents who affirmed and filed their joint counter affidavit to that effect. Further to that they raised a Notice of Preliminary Point of objections containing three grounds which as a matter of practice prompted this court to dispose them of first. With leave of the court parties argued the said grounds of objection by way of written submissions as both were represented. The applicant hired legal services of Ms. Pendo Ngowi and Mr. Samson Mbamba, both learned counsels whereas the respondents were fended by Mr. Francis Makota, learned advocate.

As alluded to herein above the respondents' grounds of objection were three going thus:

1. That the application is bad in law by combining prayers of certification of point of law and leave to appeal.
2. That the application is time barred.
3. The verification clause is defective for being witnessed by the advocate from the same office.

In the course of submission Mr. Makota for the respondents chose to abandon the 2nd ground while arguing the 1st and 3rd points of preliminary

objection. In this ruling I will follow the same line by determining each ground if need be. To start with the first ground Mr. Makota lamented, the application is bad in law for combining prayers for leave to appeal and certification of point of law which are emanating from two different provisions of the law, being section 5(1)(c) and section 5(2)(c) of AJA, something with renders it incompetent as the two prayers cannot be entertained together. He relied on the cases of **Rutagatina C.L. Vs. The Advocates Committee and Another**, Civil Appeal No. 98 of 2010 (CAT-unreported) and **Amour Azizi Vs. Halima Waziri**, Misc. Civil Application No. 123 of 2019 (HC-unreported), where the two courts held the two prayers cannot be entertained together. He added in **Amour Azizi** (supra) the first prayer was expunged from the record by the court because the anomaly was raised by the court suo mottu unlike in this matter where the anomaly has been picked as a point of objection and therefore not curable even under the overriding objectives principle. That treating the said anomaly otherwise will be tantamount to pre-empting the objection something which is intolerable as held in the case of **Mohamed Iqbal Vs. Esrom M. Maryogo**, Civil Case No. 56 of 2010 (CAT-unreported) when citing the case of **Method Kimomogoro Vs. Board of Trustees Tanapa**, Civil Application No. 1 of

2005 (CAT-unreported). On account of that submission Mr. Makota gladly invited this court to find the application is incompetent thus proceed to strike it with costs.

In rebuttal counsels for the applicant while admitting that the intended appeal being a third appeal the sought prayer for leave to appeal is rendered redundant resisted the respondents' submission that the application is omnibus for containing two prayers. According to them combination of two prayers in which one of them is redundant does not render the application fatal defective since both emanates from the same provision which is section 5(1)(c) and 2(c) of AJA and can be granted from the same jurisdiction, thus the element of being omnibus application is automatically not inferred. It was their further argument that according to the case of **Tanzania Knitwear Ltd Vs. Shamshu** (1989) TLR 48 (HC), combination of prayers is not bad in law as it is encouraged to avoid multiplicity of proceedings, therefore it is not mere combination of prayers that makes the application omnibus as what is to be looked into is only the nature of the prayers and not otherwise. Since the first prayer is already rendered redundant the learned legal minds were of the considered submission and prayer that, oxygen principle be invoked in this matter and the applicant be allowed to

amend the application as hearing of the application is yet to commence. They relied on the cases of **Sanyou Services Station Ltd Vs. BP Tanzania Ltd**, Civil Application No. 185/17 of 2018 (CAT-unreported) that allowed amendment of verification clause and **George Shambwe Vs. Attorney General** (1996) TLR 334, which set a principle allowing amendment of pleadings before commencement of hearing. The court was therefore invited to dismiss the ground for want of merit. In his rejoinder submission Mr. Makota almost reiterated his earlier submission and insisted that as per **Mohamed Iqbal** (supra) the last precedent, once a notice of preliminary objection is lodged the time to rectify the deficiency complained of expires/lapses, thus the cases of **Sanyou Service Ltd** (supra) and **Godwin Lyaki and Another Vs. Ardhi University**, Misc. Civil Application No. 242 of 2020 cannot take precedent to the recent case of **Mohamed Iqbal** (supra). It was his argument therefore that oxygen principle could not be invoked under the circumstances. Thus prayed for the application to be struck out with costs for being incompetent.

Having exhausted both parties submissions on the first ground of objection and having perused the record and case laws relied upon by the parties, the main issue which this court is called to determine is whether the application

is omnibus? It is not in dispute that in this matter the applicant is advancing two prayers, one, for leave to appeal to the Court of Appeal against the decision of this court in PC Civil Appeal No. 129 of 2019 and secondly for certification that the point of law is involved in the said decision. The said two prayers in my opinion constitute two different applications preferred under two separate subsections and for different and separate purposes as the application for leave to appeal to the Court of Appeal preferred under section 5(1)(c) of AJA is for every other decree, order, judgment, decision or finding of the High Court while section 5(2)(c) of AJA serves for appeal lying to the Court of Appeal against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates Courts Act. Part III of MCA covers matters originating from the Primary Court like the one in the present matter. As rightly submitted by counsels for the applicant the submission which I embrace, it is true that combination of prayers is not bad in law as courts of law encourage avoidance of multiplicity of proceedings. See also the cases of **Tanzania Knitwear Ltd** (supra) and **Mic Tanzania Limited Vs. Minister for Labour and Youth Development**, Civil Appeal No. 103 of 2004 (CAT-unreported). It should however be noted that the said combination is allowable only when the said

prayers are interlinked or interdependent. When it is otherwise then the omnibus application is rendered irregular and incompetent. This court in the case of **Gervas Mwakafwala & 5 Others Vs. The Registered Trustees of Morovian Church in Southern Tanganyika**, Land Case Bo. 12 of 2013 (HC-unreported) when faced with similar situation to the present one had the following views:

> *"I must hasten to say, however, that I am aware of the possibility of an application being defeated for being omnibus especially where it contains prayers which are not interlinked or interdependent. I think,* ***where combined prayers are apparently incompatible or discordant, the omnibus application may be inevitably be rendered irregular and incompetent****." (Emphasis supplied)*

Similarly in the case of **Rutagatina C.L** (supra) the Court of Appeal had this to say on the combination of two prayers with different provisions:

> *"…when two different prayers with different provisions of the law are sought in one application, then the said application becomes omnibus and cannot stand in the eyes of the law."*

It is the applicant's submission that since the prayer for leave to appeal is not applicable under the circumstances of this matter then it is rendered redundant and therefore does not render the application fatally incurable

since the same can be amended. I totally disassociate myself with that submission as on the strength of the authorities in **Gervas Mwakafwala** (supra) and **Rutagatina C.L** (supra) which I fully subscribe to, combination of two prayers founded on two different provisions of the law which are not interlinked or interdependent renders the application omnibus hence irregular and incompetent. As alluded to above the two prayers emanate from same section 5 of AJA but with two different subsections 1(c) and 2(c) serving for two different and separate purposes. It cannot be said therefore that, the two prayers are emanating from the same provision of the law as counsels for the applicant would want this court to believe. Since the two prayers serve different and separate purposes which are not interlinked or interdependent I am convinced and therefore forced to conclude that by combining them the application is rendered omnibus hence irregular and incompetent. Thus the issue is answered in affirmative and I sustain the first ground of objection. Having so done and since this ground disposes of the application I find no calling need to go for the third ground.

With the above finding then what is the remedy. Counsels for the applicant urged this court to invoke the oxygen principle and allow them to amend the application by expunging the first prayer like what this court did in the case

of **Amour Azizi** (supra), the prayer was vehemently resisted by Mr. Makota for the respondents. I think I am not prepared to accept the applicant's invitation for one strong reason that you cannot amend an incompetent application which cannot stand in the eyes of the law for containing two prayers founded on two different provisions of the law as was correctly stated in **Rutagatina C.L** (supra). It is settled law that the only remedy for incompetent appeal or application is to strike it out. This was the position in the case of **Mic Tanzania Limited Vs. Minister of Labour and Youth Development and Another**, Civil Appeal No, 103 of 2004 (CAT-unreported) where the court held thus:

> *"After all,* ***it is now trite law once an appeal or application is found to be incompetent, the only option is to strike it out*** *even if no objection had been raised to it."*
> (Emphasis supplied)

As this application is incompetent, thus cannot stand before the eyes of law then the same deserve to be struck out, the course which I hereby take and order accordingly. I however for the interest of justice order that the applicant is allowed to bring a fresh and correct application within fourteen (14) days of this ruling if he so wishes.

As regard to the costs of this application as prayed by the respondents, the applicant is ordered to cover them.

It is so ordered.

DATED at DAR ES SALAAM this 04th day of February, 2022.

E. E. KAKOLAKI

JUDGE

04/02/2022.

The Ruling has been delivered at Dar es Salaam today on 04th day of February, 2022 in the presence of the Mr. Egbert Milanzi, advocate for the Respondent who is also holding brief for Mr. Samson Mbamba, advocate for the applicant and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
04/02/2022