THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. CRIMINAL APPLICATION NO. 77 OF 2020

(From PC. Criminal Appeal No. 10 of 2019, in the High Court of Tanzania, at Mbeya, and PC. Criminal Appeal No. 39 of 2019, in the District Court of Mbeya, at Mbeya,

Originating in Criminal Case No. 715 of 2018, in the Primary Court of Mbeya District, at Urban).

AYUBU SIMKOKO.....APPLICANT

VERSUS

ZELA ROBERT.....RESPONDENT

RULING

16. 02. & 16. 03. 2021.

Utamwa, J:

This is a ruling on issues arising from a preliminary objection (the PO) raised against the application at hand. In this application, the applicant AYUBU SIMKOKO moved this court for leave to file an appeal to the Court of Appeal of Tanzania (the CAT). He also sought for any other order the court would deem fit to grant. The application was preferred under section 6(1)(b) of the Appellate Jurisdiction Act, Cap. 141, R. E. 2002 (Now R. E. 2019), henceforth the AJA. The application was supported by the affidavit sworn by the applicant himself.

The respondent, ZELA ROBERT resisted the application through her counter affidavit. She also lodged the PO against the application. The same was based on the following four limbs:

i. That, the application is incompetent as the court is improperly moved for wrong citation of the law.

ii. That, the application is supported by an incurably defective affidavit in that, it carries legal arguments, opinion and prayers.

iii. That, the court has no jurisdiction to grant the prayer sought as it is based on the wrong provisions of the law.

iv. That, the court is improperly moved since the present application contravenes section 6(7)(b) of the AJA and rule 44(1)(b) of the Court of Appeal Rules, 2009 (the CAT Rules).

Parties in this application appeared in person without any legal representation. Upon the agreement by them, the court directed the PO to be argued by way of written submissions. Both sides accordingly filed their respective submissions which in fact, had all signs of being drafted with assistance of legally skilled minds though they both claimed to be unrepresented.

In arguing the PO, the respondent began with the fourth limb of the PO. I will thus, firstly consider and determine an issue on this limb. If need will arise, I will also test the other limbs of the PO. This plan is based on the understanding that, in case the first limb will be upheld, it will be forceful enough to dispose of the entire matter.

Regarding the first limb of the PO, the respondent contended that, the application contravened section 6(7)(b) of the AJA which guides on

the procedure for appeals in relation to criminal matters arising from primary court like the one under consideration. These provisions require an aggrieved party intending to appeal to the CAT against a decision of this court to firstly apply and obtain a certificate of point of law from this court. These provisions thus, bars any appeal of this nature lacking such certificate of point of law. The applicant in the matter at hand therefore, was obliged to apply for a certificate of point of law and not for leave to appeal to the CAT. Without such certificate, one cannot appeal to the CAT in matters of this nature. She supported the contention by a decision of this court (Kakolaki, J.) in **Rukia Said v. Juma Hemed Mbyepe, Misc. Civil Application No. 491 of 2018, High Court of Tanzania at Dar es Salaam** (unreported).

In his replying submissions, the appellant essentially conceded not only to the fourth limb of the PO, but also to the other limbs of the said PO. He however, contended that, since he is a layman, the court is supposed to close eyes, ignore the irregularities at issue and proceed to consider the application on its merits. He supported his argument by a decision of this court (Mkwaya, J. as he then was) in the case of **Ramadhani Nyoni v. M/S Haule & Company, Advocates [1996] TLR 71.** The respondent did not file any rejoinder submissions against the applicant's replying submissions.

I have considered the record of the court, the arguments by the parties and the law. In my view, since the applicant conceded to the irregularities at issue, but only disputes its legal effect, the issue has been reduced to this; *which is the legal effect of the irregularity complained of under the fourth limb of the PO, on the application at hand?* The respondent wants this court to find that the irregularity is fatal to the

extent of rendering the application incompetent. On the other hand, the applicant wants this court to ignore the same for being a minor abnormality.

In my further view, the circumstances of the case calls for this court to make a finding in favour of the respondent on the following reasons: in the first place, it is not disputed by the parties that, the law does not make any requirement for seeking leave to appeal to the CAT in appeals of this nature. As rightly argued by the respondent, what the law guides, is only for the aggrieved party to apply and obtain a certificate of point of law as per section 6(7)(b) of the AJA. The applicant did not tell this court that he has obtained the certificate of point of law. He did not also disclose to this court as to why it (this court) has to bother in considering his application for leave to appeal to the CAT though the same is not a legal requirement. The application at hand was thus, purposelessly filed before this court.

Again, the applicant's contention implies that, he wants this court to consider the application at hand (for leave to appeal) as an application for a certificate of point of law. However, the court cannot do so because, these are two different legal creatures. A leave to appeal is a requirement in civil appeals under section 5 of the AJA. These provisions do not apply in the matter at hand since it is a criminal matter originating in primary court as shown earlier. On the other hand, a certificate of point of law is a requirement in criminal appeals under the section 6(7)(b) of the same AJA and applies in the matter under consideration. It follows thus, that, one cannot convert an application for leave to appeal into an application for a certificate of point of law as the applicant wanted this court to do.

I have also considered the **Ramadhani Nyoni case** (supra) on which the applicant pegged his contentions. Indeed, I agree with him that, the decision basically held that, wrong citation of the enabling provisions in an application and irregularities in an affidavit can be cured under section 95 of the Civil Procedure Code, Cap. 33 (the CPC). This is more so where a layman is involved. Indeed, the decision was based on the general and trite principle that, courts should not put overreliance on procedural technicalities since procedural rules are meant to aid justice and not to defeat it. In fact, this is among the few precedents which underscored the elements of what is currently known as the overriding objective. The decision was made in 1991 even before the law was amended in 2018 to underline the principle of overriding objective. I will discuss this principle in details later.

However, the principle underlined in the **Ramadhani Nyoni case** (supra) was not in my view, a broad spectrum panacea for each and every breach of procedural rule or law by a layman. Otherwise, procedural rules and laws would be rendered nugatory. This results, could not be the intention of making such rules and laws. Indeed, curability of abnormalities under section 95 of the CPC applies to minor irregularities which do not go to the root of the matter and do not cause injustice to any party.

Nevertheless, in the matter at hand, the complained of irregularity is not simply a wrong citation of the enabling provisions of the law. The complaint is against the applicant's failure to comply with the law and the irrelevancy of his application at hand. It follows thus, that, since the application at hand is purposeless as I have shown above, and since it tries to circumvent the provisions of section 6(7)(b) of the AJA as

demonstrated above, this abnormality cannot be assessed as minor so as to be curable as envisaged by the applicant. The **Ramadhani Nyoni case** is therefore, distinguishable from the circumstances of this case.

Certainly, the application at hand cannot even be saved by the principle of overriding objective mentioned above. The principle of overriding objective just mentioned above has been recently underlined in our laws by amending some statutes including the CPC and the AJA. The amendments were effected through the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018. The principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice. It was underlined by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported Judgment dated 10 October, 2018). It must however, be born in mind that, the elements of the principle of overriding objective existed even before the amendments of the law cited above. Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (the Constitution) for example, underscored the need for courts to decide matters (criminal and civil) on substantial justice without being overwhelmed by procedural technicalities. These constitutional provisions existed even before the amendments mentioned above were performed.

Nonetheless, the principle of overriding objective was not meant to absolve each and every blunder committed by parties in court proceedings. Had it been so, all the rules and laws of procedure would be rendered nugatory and useless as I hinted earlier. The principle does not thus, create a shelter for each and every breach of the law on procedure, including violations against the law which is relevant to the matter at

hand. This is the envisaging that was recently underlined by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of overriding objective amid a breach of an important rule of procedure.

In fact, the principle of overriding objective is also commonly known as the oxygen principle. The courts equate the operation of the principle to the process of adding oxygen to a dying creature so as to retrieve its life. However, since the matter at hand seeks what does not exist in law, it can be equated to a dead creature. One cannot add oxygen to a creature which is already dead. That exercise will be superfluous since a dead creature can never be resuscitated. The oxygen principle (or the principle of overriding objective) only gives a resuscitation to a weak matter, but, does not offer any resurrection to a dead one.

Having observed as above, I answer the issue in favour of the respondent that, the irregularity under discussion (complained of under the fourth limb of the PO) is fatal on the application at hand and is incurable. This finding makes it unnecessary to consider the other limbs of the PO since the finding is capable of disposing of the entire matter. I will not thus, consider them. I therefore, uphold the PO for the reasons shown above only. I consequently find the application incompetent and I strike it out. I make no order to costs since this is essentially a criminal matter as indicated earlier. It is so ordered.

THE HIGH COURT OF TANZANIA

J.H.K. UTAMWA,
JUDGE
16/03/2021

16/03/2021.
CORAM; J. H. K. Utamwa, Judge.
Appellant: Present in person.
Respondent: Present in person.
BC; Ms. Gaudencia, RMA.

Court: Ruling delivered in the presence of the applicant and the respondent, in court, this 16th March, 2021.

J. H. K. UTAMWA
JUDGE
16/03/2021.