IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. LAND APPLICATION NO. 85 OF 2019

(c/f The District Land and Housing Tribunal of Arusha at Arusha, Land Appeal No. 84 of 2016, originating from Sombetini Ward Tribunal in Application No. BR/ SOMB/KS/76/2016)

MORRIS SHEPEA ..... APPLICANT

VERSUS

RAFAEL LENESIRA MOLLEL ..... RESPONDENT

RULING

11/5/2021 & 25/6/2021

ROBERT, J:-

The Applicant, Morris Shepea, sought to be granted extension of time to file an appeal to this Court against the decision of the District Land and Housing Tribunal of Arusha in Land Appeal No. 84/2016 dated 16th May, 2017. The application is filed under section 41(2) of the Land Disputes Courts Act, Cap. 216 R.E. 2002 as amended by the Written Laws (Miscellaneous Amendments) Act, No.2 of 2016.

The Applicant was aggrieved by the decision of Arusha District Land and Housing Tribunal in Land Appeal No. 84 of 2012 which was delivered on 16/5/2017. On 25/5/2017 he wrote to the District Tribunal through his advocate praying to be supplied with a copy of proceedings and judgment in order to prepare his appeal to this Court. After a close follow up he finally managed to receive copies of the documents on 18/7/2017. He then filed his appeal to this Court which was struck out on 28th October, 2019. Hence, this application.

Both parties in this application were represented whereby, the Applicant was under the services of Mr. Lawena, learned counsel while Mr. Dismas Lume, learned counsel appeared for the Respondent. Hearing proceeded by way of written submissions and both parties filed their submissions as scheduled by an order of the Court.

It appears from the filed submissions that Mr. Lume raised an issue regarding the provision of law cited by the Applicant to move this court to grant the relief sought. As a practice, this court finds it appropriate to dispose of this issue first before proceeding with the matter on merit.

Mr. Lume posed an issue to the effect that, the court is wrongly moved to exercise its discretionary powers to grant the prayer for extension of time by using the provision of section 41(2) of the Land Disputes Courts Act, Cap. 216 R.E. 2002 as amended by the Written Laws (Miscellaneous Amendments) Act, No.2 of 2016. He argued that there is a myriad of decisions of this Court and the Court of Appeal of Tanzania to the effect that, wrong citation of the proper provision renders the said application incompetent in law. To buttress his argument, he referred the court to the case of **ALMAS IDDIE MWINYI vs. NATIONAL BANK OF COMMERCE AND MRS NGEME MBITA (2001) TLR 83.**

Responding to the issue raised, Mr. Lawena admitted in rejoinder submissions that, this application was filed under a wrong provision of the law as the correct provision is section 38(1) of the Land Disputes Courts Act, Cap. 216 R.E. 2002 as amended by the Written Laws (Miscellaneous Amendments) Act, No.2 of 2016. However, the learned counsel argued that this does not prejudice the jurisdiction of this Honourable court to grant such prayer as the court has jurisdiction to grant the prayer sought.

Mr. Lawena submitted further that, the case of **Almas Iddie Mwinyi** cited by the learned counsel for the Respondent has long been overtaken by

events. He argued that, the amendments and inclusion of section 3A in the civil procedure Code, Cap. 33 R.E. 2018 calls upon courts to exercise their powers in reflection to the just determination of proceedings and without being tied by procedural rules if the same does not prejudice the justice of a party.

He submitted that the Court of Appeal of Tanzania took this position long time ago in the case of the National Housing Corporation versus Etienes Hotel, Civil Application No. 10 of 2005, CAT at Dar-es-salaam (unreported) at page 4 where the Court observed that "it has always been that Rules of procedure are handmaids of justice and I take this to mean that they should facilitate rather than impede decisions on substantive issues".

He argued that the citation of section 41(2) of the Land Disputes Courts Act has not occasioned any injustice to the Respondent herein. Accordingly, he implored the court to direct its mind on the prayer sought by the Applicant in order to arrive at substantive justice.

From the submissions made by the learned counsel for both parties, it is not disputed that the provisions of section 41(2) of Cap. 216 R.E. 2002 as amended by the Written Laws (Miscellaneous Amendments) Act, No.2 of

2016 cited by the Applicant is inapplicable in support of an application for extension of time to file an appeal to this court.

The only question for determination is whether citing of a wrong and inapplicable provision in support of an application renders the application incompetent. The answer to this depends on whether it constitutes a fundamental error which goes to the root of the matter or it is a mere technicality.

Although counsel for the Applicant argued that citing of inapplicable provision of law does not prejudice the jurisdiction of the Court to grant the prayer sought, the fact is that the Court is always moved to grant orders sought in an application by provisions of law cited in support of the relevant applications. Whenever a party cites a wrong or inapplicable provision of law the Court has always been quick to hold that the application is incompetent since the court is not properly moved. (see Robert Leskar v. Shibesh Abebe, Civil Application No. 4/2006, CAT (unreported), Hussein Mgonja vs The Trustees of the Tanzania Episcopal Conference, Civil Revision No. 2 of 2002, CAT, unreported)

In the case of **China Henan v. Salvand K.A. Rwegasira (2006) TLR 220** the Court of Appeal of Tanzania held that the error in citing a wrong and inapplicable rule in support of the application is not a technicality, it is a matter which goes to the very root of the matter.

This court is aware of the principle of overriding objective introduced under section 3A and 3B of the Civil Procedure Code which require courts to have regard to substantive justice by putting less emphasis on procedural technicalities in the process of administration of justice. However, as stated in the case of **China Henan** (supra), an error in citing a wrong and inapplicable provision of law in support of the application is not a mere technicality, it is an error which goes to the root of the matter. Accordingly, once an application is based on a wrong legal foundation it becomes incompetent.

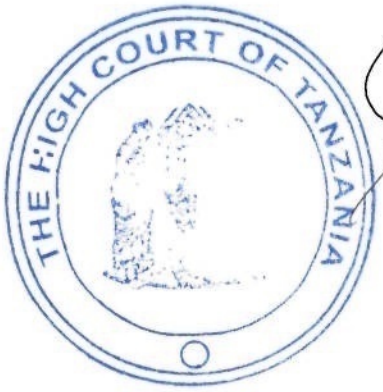
Further to this, the Court is of the view that, in order to further the overriding objective of the law in the administration of justice which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes, the court is expected to enforce compliance of the laws and parties are required to help the court by complying with the laws, practice and orders given. The principle is not intended to encourage parties or their

advocates to consider as superfluous the provisions of law intended to move the court to grant the prayers sought.

In the case of **Mariam Samburo vs. Masoud Mohamed Joshi and others, CAT, Dar-es salaam (2019)**, the Court of Appeal of Tanzania held that the overriding objective principle does not require the court to disregard jurisdictional matters which go to the root of the suit and further that, the principle cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case.

In the foregoing, I find this application to be incompetent for citing a wrong and inapplicable provision of law. Consequently, I struck it out. The Applicant is at liberty to file a proper application.

It is so ordered.



K.N.ROBERT
JUDGE
25/6/2021