

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

MISC. LAND APPLICATION NO. 86 OF 2020

(Arising from the District Land and Housing Tribunal for Muleba at Muleba in Land Appeal No. 74 of 2018 and original from Land Application No. 81 of 2016)

JOSEPH RWAKASHENYI.....APPLICANT

VERSUS

RWANGANILLO VILLAGE COUNCIL & 21 OTHERS..... RESPONDENTS

RULING

Date of Ruling: 27/09/2021

Mwenda, J.

This is an application for leave to appeal to the Court of appeal brought under Section 47(1) (sic) of the Land Disputes Court Act, [Cap 216 R.E 2002(sic)]. It is supported by an affidavit sworn by the Applicant. In counter thereof the respondents swore counter affidavits preceded by notices of preliminary objections which read as follows:

- i. That the applicant's Misc. Land Application is bad in Law for wrong citation of Law*
- ii. That the application is improperly filed at this court and it has been filed out of prescribed time given by the Law.*

During hearing of this application, the applicant was represented by Mr. Chamani, learned advocate while the 1st and 2nd respondent were represented by Mr. Muyengi Muyengi, learned state attorney. The 3rd -22nd respondents were represented by Ms. Fatma Hamad, the 4th respondent.

It is trite law that once preliminary objection is raised the court has to consider it first before commencing hearing of the main suit or application, see the case of ***Khaji Abubakar Athumani V. Daud Lyakugile T/A D.C. Aluminium and Another, Civil Appeal No. 86 Of 2018 (Unreported)***

When given the floor to address this court in respect of preliminary objection, Mr. Muyengi Muyengi, learned state Attorney informed this court that they are abandoning the second preliminary objection as they are satisfied that the application was filed within time. He thus prayed to remain and proceed with the first preliminary point of objection.

Submitting in support of the 1st preliminary objection, the learned state attorney submitted that the application is brought under a wrong citation of enabling provision of the Law in that the chamber summon cited section 47 (1) of the Land Disputes Courts Act, [CAP 216 R.E 2002]. According to the learned State attorney the present application was filed in 2020, when there were amendments which changed the Land Disputes Court's Act, [CAP 216 R.E 2002] to Cap 216 RE 2019. He stated further that even the enabling section and the subsection are wrongly cited. He said the proper citation ought to be section 47 (2) of Land Disputes

Court's Act [Cap 216 RE 2019] as the impugned judgment was preferred as an appeal from the court which was exercising appellate jurisdiction and not original jurisdiction. For that matter, he said, this application is brought contrary to the law. Even if the said law was R.E. 2002, the court would not grant the prayers as prayed as section 47 (1) applies if the High Court was exercising original jurisdiction. He then concluded by stating that this application is incompetent for citing a dead law and he prayed this application to be dismissed with costs.

Ms. Fatma Hamad, the 4th respondent who stood for the 3rd – 22nd Respondents, when called to address the court in respect of the preliminary objection which are similar to the ones raised by the 1st and 2nd respondents, had nothing to add from what is raised in the notice of preliminary objection, she however prayed this court to adopt and consider them in making findings.

In rebuttal Mr. Chaman, learned Advocate for the applicant submitted that the respondents' Preliminary Objections are of no effect as even if there is omission or wrong citation of law what is key is this court's mandate to hear and determine the main application before it. He supported this point by citing the case of case of ***Alliance one Tobacco (T) LTD and Anor vs Mwajuma Hamis Msc. Civil Application NO. 803 of 2018 (unreported)*** he said that with anomalies such as the ones raised by the respondent the court may order correction by pen or hand

writing. He cited the case of ***Samwel Munsivo vs. Meche Mwikwabe, (CA), Civil Application No. 539 of 2019 (unreported)*** in support thereof. He concluded by stating that under these circumstances, the chamber summons may be corrected by a pen or handwriting so as S. 47 (1) to read 47 (2) and [Cap 216 RE 2002] to also read [CAP 216 R.E 2019] and allow the case to proceed with hearing on merits.

In rejoinder, the learned State Attorney submitted that this court cannot be put in dilemma on what to do in order to do justice. He said that in the case of ***Samwel Muniso Vs. Meche Mwikwabe*** (supra) cited by the learned advocate for the applicant, there was omission in citing subsection under a living or correct law but in our case, he cited wrong section in a dead law. Further to that he said that the said case was not referring to a general law but in our case there is specific law, which is CAP 216 R.E 2019 which specifically deals with matters to be referred to Court of Appeal of Tanzania.

The learned state attorney further submitted that the case of ***Alliance ONE Tobaccos (T) LTD and Anor vs Mwajuma Hamis*** (supra) is distinguishable as it was dealing with the issue of extension of time whereas in the present case the applicant cited the dead law and the court cannot therefore give room for corrections. He said the position would be different if the respondent had not raised the preliminary objection. He concluded by repeating to their previous prayers of striking out this application with costs.

Having heard the submissions by the parties the issue is whether or not the wrong citation of enabling provision and a dead Law is minor to enable this court to order the applicant to insert the correct provision of the Law.

From the record, it is clear that the applicant's application which was filed in 2020, emanates from Land Appeal No. 74 of 2018 where in which this court was in exercising its appellate jurisdiction.

The respondents challenged the present application in two ways; one that the applicant cited a dead law which is CAP 216 R.E. 2002 instead of CAP 216 R.E 2019 and two, that instead of citing Section 47(2) of the Land Disputes Court Act [CAP 216 R.E 2019] he cited Section 47(1) of [CAP 216 R.E 2002]. The respondents are of the view that this application is incompetent for citation of dead Law and wrong enabling provision.

To tackle this issue this, court went through Section 47(2) of The Land Disputes Courts Act, [CAP 216 R.E 2019]. This section reads as follows and I quote :-

47.-(1) N/A

(2) "A person who is ***aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction*** may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal".[emphasis added]

From the wording of this section, it is clear that the applicant who seeks leave to appeal to the court of appeal to challenge the decision of this court in exercise of appellate jurisdiction should rely on Section 47(2) above.

It is trite Law that a party who cites the provision of Law as enabling provision of his or her application or pleading must specify by citing exactly the relevant provision. In the case *of Theotino Itanisa and Another V. Pantaleo Kasabira @Pantaleo Sylvester Rwiza, Civil Application No. 11 of 2015*, (unreported), citing the case of *Anthony J. Tesha V. Anitha Tesha, Civil appeal No. 10 of 2003, (CA)* (unreported) this court held as follows:

"This Court has said number of times that wrong citation of enabling Provision of Law or non-citation renders an application incompetent."

[emphasis added]

Again, in the case of *China Henan International Cooperation Group V. Salvand K.ARwegasira, Civil Reference No. 22 of 2005* it was held inter alia that:

"...the role of rules of procedure in administration of justice is fundamental as stated by Collins M.R. in Re Coles and Ravenshear (1907) 1 KB.1 rules of

procedure are intended to be that of hands maids rather than mistresses. That is, their function is to facilitate the administration of justice. Here, the omission in citing the proper provision of the rule relating to a reference and worst still the 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 as argued....”[emphasis added]

In our case, the Learned Advocate for the applicant subscribed to existence of the said errors but was of the view that the said errors are minor and may be corrected by inserting correct provisions and the law by hand writing. Impliedly the learned advocate for the applicant invited this court to invoke the principle of overriding objective. In the case of **Mbezi fresh Market Limited and two others V. International Commercial Bank (Tanzania), Misc. Commercial Application No. 93 of 2020(unreported)** this court held inter alia that :

“At this Juncture, I think it is worth pointing out that despite the advent of the principle of

overriding objective, the position of Law as far as the Legal requirement to move the court properly is concerned is still the same, that is, the parties to a case have to move the court properly by citing proper provisions of the law.....” [emphasis added]

Again, the advocate for the applicant was of the view that the applicant may be allowed to insert the correct provision of enabling provision. It is however the position of the law that an application made to pre-empt a point of preliminary objection is not allowed (see ***Mbezi fresh Market Limited and two others V. International Commercial Bank (Tanzania)*** (supra))

This court is therefore of the view that the case of Alliance tobacco is distinguishable as in that case the court dealt only with wrong citation of Law but in the present case the applicant not only cited a wrong provision of the law but also made reference to a dead law. This is fatal and goes to the root of the case.

That being said this court concludes that the present application is incompetent for wrong citation of the law and enabling provision of the Law.

I therefore find merits in the respondents’ Preliminary Objection and I hereby strike out this application with costs.

It is so ordered.





A.Y. Mwenda
Judge

27.09.2021

This ruling is delivered in chamber under the seal of this court in the presence of Joseph Rwakashenyi the applicant and in the absence of the respondents.




A.Y. Mwenda
Judge

27.09.2021

