

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**BUKOKA DISTRICT REGISTRY**  
**AT BUKOKA**

**LAND APPLICATION NO. 27 OF 2021**

*(Arising from Land Application No. 10 of 2019 High Court Bukoba and Original Application No. 13 of 2015 of the District Land and Housing Tribunal for Kagera at Bukoba)*

**ZAMLAT AYUBU..... APPLICANT**

**VERSUS**

**SAMWEL MANUMBU..... RESPONDENT**

**RULING**

11/10/2021 & 08/12/2021

**NGIGWANA J.**

This ruling is in respect of the preliminary objections (PO) raised by the respondent through his advocate Ms. Pilly Hussen, challenging the application filed by the applicant Zamlat Ayubu who is seeking leave of this court in order to appeal to the Court of Appeal of Tanzania. The application is preferred under section 47(1) of the Land Disputes Courts Act, [Cap 2016 R: E 2019], and supported by affidavit deposed by Mr. Alli Chamani, Advocate for the applicant.

The same was opposed by counter affidavit sworn by Mr. Zedy Alli, advocate for the respondent. Together with the opposing counter affidavit, a notice of preliminary objection containing two points was filed. The two objections were couched viz:

- (i) This Application is incompetent as the honourable Court has not been properly moved.

- (ii) The Application is incurably defective for being supported with a defective Affidavit in verification clause.

The submissions by both parties were oral. The respondent's counsel, Mis Pilly Hussen started submitting on the first P.O that, the applicant by citing section 47(1) of Cap 216 rendered the application incompetent as the court was not properly moved. He substantiated that the cited provision of section 47(1) is applicable where the party is aggrieved with the decree of the High Court when it is exercising its original jurisdiction while the applicant ought to have moved this court under section 47(2) of Cap 216 which is applicable with this case at hand where the matter originates from District Land and Housing Tribunal for Kagera at Bukoba and therefore High Court was exercising its appellate jurisdiction. He cited the case of **Salum Nhumbili vs Republic, Criminal Application No.04 of 2013**, CAT at Mwanza, (unreported) which ruled that wrong citation is fatal and renders such application incompetent and therefore has the effect of being struck out.

As regard to the second point, the respondent's counsel submits that the application is supported by incurably defective affidavit. That the law under Order VI rule 15(2) of Civil Procedure Code Cap 33 R.E 2019 requires that the verifier in the verification clause must specify the paragraphs in which he had personal Knowledge and those facts based on information from others.

The respondent counsel explained that looking at the affidavit supporting the application, fact No.3 is not in the knowledge of the Advocate neither the applicant. Likewise, paragraph 4 the notice was prepared and filed by A. K. Chamani Advocate, therefore the fact was in the knowledge of the Advocate and not the applicant. Similarly, paragraph 5 the facts were in

the knowledge of the Advocate and not the applicant and therefore the affidavit is defective that once the affidavit is defective, we remain with the chamber summons alone which cannot stand alone contrary to XLII rule 3 of the CPC Cap 33 R.E 2019 which requires any application to be by way of chamber summons supported by an affidavit thus the chamber summons alone renders an application incompetent.

In reply, starting with the first point Mr Chaman outrightly conceded that the proper law which was supposed to be cited is section 47(2) and not section 47(1) of Cap 216 but was of the view that today in the advent of Overriding objectives wrong-citation cannot deprive the jurisdiction of the court. He cited **Dangote Cement Limited vs NSK Oil Gas Limited**, Misc. Commercial Application No.08 of 2020, Commercial Division at Arusha, **Samwel Munsiro vs Chacha Mwikwabe**, Civil Application No.539/08 of 2019, CAT at Mwanza (Unreported), **Alliance One Tobacco Tanzania Limited and another vs Mwajuma Hamis (as the administratrix of the estate of Philemoni R. Kilenyi) and Another**. Misc. Civil Application No. 803 of 2018, HCT at DSM.

It was Mr. Chamani's submission that the case of **Salum Nhumbili vs Republic** (supra) relied upon by the respondent counsel is of 2013 which is no longer applicable thus it has been taken by overriding objective as the recent Court of Appeal authority in **Samwel Munsiro** (supra) of 2019 has held that wrong citation is not fatal. He argued that where there are two conflicting decisions, we follow the most recent one.

Responding to the second point of law, Mr. Chaman reacted that Order VI of the CPC Cap 33 R.E 2019 defines the meaning of pleadings. That Affidavit is not part of pleadings that the order is not applicable. He went on that paragraph 3, 4, 5 is said to be in the knowledge of the advocate

but it is true that every person who is above 18yrs old is presumed to know the law. It is not true that paragraph 3, 4 and 5 were in the knowledge of the Advocate alone. That verification has no problem what matters is substantive justice.

In rejoinder, Ms. Pilly submitted that overriding objective principle has been there but should not be introduced to defeat mandatory provision of law and that the same should not be applied blindly that the court has no duty to find the law for the parties. The court should not entertain matters which are before it unprocedural. That, the Court of Appeal cases cited are distinguishable as they dealt with matters different from those in High Court, and that High Court cases are not binding to this court.

As regard to the second P.O, the respondent counsel dismissed the applicant's counsel argument that every person who is above 18 years old is presumed to know the law but the paragraph speaks for itself that the facts were in the knowledge of the advocate for the applicant.

Now having considered the submissions of both parties, I start determining the merit of the P.O in the first limb. I am in agreement with the learned counsel for the respondent that the provision of section 47(1) of Cap 216 cited by the applicant was wrong and therefore the court was not properly moved. Section 47 (1) of Cap 216 R: E 2019 provides that;

*"A person who is aggrieved by the decision of the High Court in the exercise of its original jurisdiction may appeal to the Court of Appeal in accordance with the provisions of the Appellate Jurisdiction Act".*

This court in Land Appeal case No.10 of 2019 was exercising its appellate jurisdiction therefore, the applicant ought to have moved the court under section 47 (2) of Cap 216 R: E 2019 which states that;

*“ 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”*

As rightly argued by Ms. Pilly, wrong citation of the law renders the application incompetent as stated by the Court of Appeal case in **Salum Nhumbili versus Republic** (Supra) which was delivered in 2013.

However, recently, in 2019 Court of Appeal of Tanzania in **Dangote Cement Limited versus NSK Oil Gas Limited (Supra)** ruled that, wrong citation is curable since what is prayed for is within the jurisdiction of the court to grant. It is trite that according to the doctrine of judicial precedent, the decisions of the superior court bind the inferior ones. In Tanzania, the Court of Appeal is the apex court in vertical hierarchy meaning that its decisions bind the High Court and courts below it. In the issue at hand, we have two conflicting binding Court of Appeal decisions the glaring issue is which one should this court follow.

In resolving this controversial, I am fortified and guided by with the applicant's position that where there are two conflicting Court of Appeal decisions on similar issue, we follow the most recent one. Also See **Mantra (Tanzania) Limited vs The Commissioner General, Tanzania Revenue Authority**, Civil Appeal no. 430 of 2020 where it held that:

*“Where there are two conflicting decisions of the Court on the similar matter, the Court, unless otherwise justified, is expected to follow the more recent decision.”*

I therefore derive much help from the recent Court of Appeal decision in **Dangote Cement** case (Supra) deciding that wrong citation is curable as this court still has jurisdiction to grant what is prayed for. I now shut this

discourse by ruling that the first P.O therefore lacks merit and is consequently dismissed.

Coming to the last P.O, which is the complaint that the Application is incurably defective for being supported with a defective Affidavit in verification clause. When substantiating on this P.O, the respondent's counsel hinged on the law under Order VI rule 15(2) of Civil Procedure Code Cap 33 R.E 2019 which requires that the verifier in the verification clause must specify the paragraphs in which he had personal Knowledge and those facts based on information from others.

It is a general rule that, every application made to the court must be by way of chamber summons supported by an affidavit. Order XLIII rule 2 of the Civil Procedure Code, Cap 33 R: E 2019 states;

*"Every application to the court made under this code shall, unless otherwise provided, be made by a chamber summons supported by affidavit".*

It is also the law that affidavits must be confined to the facts in which the deponent will be able of his/her knowledge to prove. See Order XIX rule 3 (1) of the CPC. It follows therefore that, the deponent must in the verification clause state which facts are based on his/her own knowledge and those which are based on the information obtained from some other person. It was the argument of the Applicant's advocate that affidavits are not pleadings therefore can not be subjected under the interpretation of Order VI rule 15(2) of Civil Procedure Code Cap 33 R: E 2019. He further stated that every body who is above the age of 18 years old is presumed to know the law.

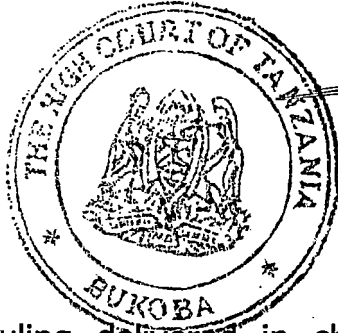
With due respect to the applicant's learned counsel, according to the Court of Appeal of Tanzania in **Mbeya Rukwa Auto, Parts and Transport Ltd**

**versus Jestina George Mwakyoma** [2003] TLR 25, an affidavit, counter affidavit and reply thereto (if any) filed in an application amount to pleadings. For that matter, they must be verified according to the dictates of Order VI rule 15(2) of Civil Procedure Code Cap 33 R.E 2019.

Again, the court is in agreement with Mr. Chamani, learned counsel for the applicant that every person who is above the age of 18 years is presumed to know the law. However, reading paragraphs 3, 4 and 5 carefully, and taking into account the fact that, in the trial tribunal in Application No. 13 of 2015, and in Land Case No. 10 of 2019 before this court, the applicant had the legal services of Mr. Alli Chamani, and the fact that, the Notice of Appeal was drawn, signed and filed by Alli Chamani, it is the finding of this court that it can never be said that the information contained in the said paragraphs was in the knowledge of the applicant, but in the knowledge of the applicant's advocate. With no doubt the affidavit is defective. The paragraphs are very clear, and for that matter, the alleged presumption is of no use in this application. For easy reference, the paragraphs read;

- 3. That the applicant is required to seek leave to appeal to the Court of Appeal of Tanzania within 30 days of the decision but after lodging the notice of appeal".*
- 4. That the applicant filed the notice of Appeal to Appeal to the Court of Appeal on or about March, 2021 vide E.R.V. No. 246 41139.*
- 5. That the points of law to be referred to the Court of appeal of Tanzania which the applicant is seeking leave for are contained in the documents titled "grounds of Appeal for leave to appeal".*

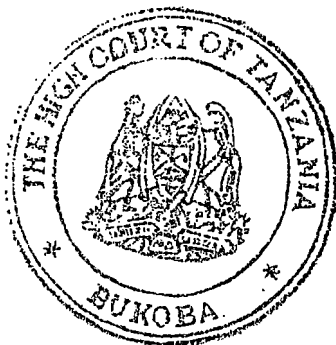
Having declared the affidavit in support of the of the chamber summons defective, it means that the chamber summons before this court is without a supporting affidavit and therefore incompetent. In the premise, I sustain the 2<sup>nd</sup> limb of preliminary objection, and proceed to strike out the application with costs. It is so ordered.



  
E. L. NGIGWANA  
JUDGE

08/11/2021

Ruling delivered in chambers this 8<sup>th</sup> day of December, 2021 in the presence of the Fahad Rwamayanga holding brief for Mr. Alli Chamani, learned advocate for the Applicant, Mr. E. M. Kamaleki, Judge's Law Assistant and Gosbert Rugaika, but in the absence of the respondent.



  
E. L. NGIGWANA  
JUDGE

08/12/2021