IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 26 OF 2022

(Arising from Miscellaneous Civil Application No. 506 of 2020 of High Court of Tanzania Dar-es-salaam District Registry, before Hon. Mlacha J Original, Original Probate and Administration Cause No 36 of 2018)

BETWEEN

ANGELA IVO MAYEKA..... APPLICANT

VERSUS

NORGAITTY MAYEKA..... RESPONDENT

RULING

MRUMA, J.

This is a ruling on a preliminary objection taken at the instance of the Respondent to the effect that the application filed by the Applicant is defective on one ground namely;

1. *It is unmaintainable for being brought under the wrong section of the law.*

At the hearing parties were duly represented. The Applicant was represented by Mr. Michael B. Mihayo learned advocate and Respondent was represented by Mr. Michael Mahende learned advocate. When the preliminary objection was called for hearing court

ordered the same to be argued by way of written submissions I am grateful to the counsel for the parties for their prompt compliance.

Submitting in support of the objection, counsel for the Respondent submitted that citing section 3 (1) and Part III of column 3 of the Law of Limitation Act, Cap. 89 R.E 2019 as an enabling provision was wrong because those provisions do not invest any power to the court to grant the reliefs sought and as such, this Court has not been properly moved to grant the orders sought in the Chamber Summons. The learned counsel contended that the cited provisions are meant to describe timeframe provided for different cause of actions and not for extension of time. He stated that the Applicant was supposed to move the court under the provisions of section 14 of the Law of Limitation Act. It is further contention of the learned counsel that the position of the law in regards to applications which are brought under wrong provision of the law is very clear that, court will proceed to struck them out. He cited to this Court its own decisions in the cases of **JUMA MOHAMED FUTO VS SHABAN SELEMAN (Administrator of the late Abdala Juma Konge), and Land Revision No. 13 of 2020, between WILFRED JOHN VS PAUL KAZUNGU.** The Respondent counsel cemented his

proposition by citing severally decisions of the Court of Appeal including **China Henan International Co-operation Group Vs Salvand K. A. Rwegasira Civil Reference No.22 of 2022, Mondorosi Village Council and Others, Civil Appeal No. 66 of 2017,** Where the Court of Appeal was of the view and went further to declare that the rules of procedure in the administration of justice are fundamental and that wrong citation of enabling provision of the law is a matter which goes to the very root of the matter thus one could not hide under the umbrella of overriding objective principle as the same cannot be applied blindly against mandatory provisions of the procedural law which goes to the very foundation of the case. Responding to the counsel for the Respondent's submissions, Counsel for the Applicant impliedly conceded to the preliminary objection raised and submitted that if this court will find that it has not been properly moved, it should go ahead and find the same as slip of pen and an error which can be ignored and overruled and amendment be ordered. The learned counsel contended that there was improper raising of points by way of preliminary objection which unnecessarily increase costs and on occasion, confuse issues. To support that

contention the learned counsel cited the case of **Karata Ernest and Others Vs Attorney General, Civil Revision No. 10 of 2010 CAT, (Un-reported).** The learned counsel submitted that an error of citing wrong provision is curable and it does not prejudice the Respondent in an anyhow. He concluded by urging this court to allow the application for the purpose of ensuring that substantial justice is well achieved and prayed the objection to be overruled and the matter be heard on merit.

From the submissions by the parties' counsel the question that I am called to answer is whether this court has been properly moved. At this juncture I must say that the law regarding this issuer is well settled. It is to the effect that wrong citation or non-citation of the enabling provisions of the law renders the application incompetent. This has been stated in a number of decided cases when this court and the Court of Appeal were faced with similar circumstances as the present one. For instance, in the case of **Hussein Mgonja versus The Trustees of the Tanzania Episcopal Conference,** Civil Revision No.02 of 2002, CA (unreported), where the Court of Appeal when striking out an application on the ground of incompetence

stated thus;

> *"If a party cites wrong provision of the law, the matter becomes incompetent as the court will not have been property moved"*

In **Edward Bachwa & Three Others vs The Attorney General & Another,** Civil Application No. 128 of 2006 the same court held that.

> *"The applicant herein moved this court by citing Order IX Rule 9, Order XLIII Rule 2 and section 95 of the Civil Procedure Code as enabling provisions to set aside the dismissal order, however, it is clear and from his own concession that the cited provisions are irrelevant hence amounts to wrong citation".*

From the discussion above I have no doubt that the Applicant didn't properly move the court. The question that follows is whether, having ruled that the court has not been properly moved, this application is incompetent. As already stated above, in view of the decision of the Court of Appeal in the case of **Hussein Mgonja** (supra) that if a party cites wrong provision of the law, the matter becomes incompetent, it follows that this application is also incompetent for it has been filed under the wrong provisions of the law. Counsel for the Applicant has urged this court to invoke the oxygen principle and

focus on the substantive part of the matter stating that wrong citation does not prejudice the Respondent anyhow. With due respect to the learned counsel, I do not share the same view. The gravity of the error in citing a wrong enabling provision was stated by the Court of Appeal in the case of **China Henan International Co-operation Group versus Salvand K.A Rwegasira,** [2006] TLR. 220, where the court held that;

> *"Here the omission in citing the proper provision of the rule relating to a reference and worst still 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 preview of Article 107A (2) (e) of the Constitution. It is a matter which goes to the very root of the matter"*

In the case at hand the Applicant didn't cite any enabling provisions. The provisions cited were irrelevant and no-applicable. This kind of wrong citation does go to the root of the matter because there is no connection between the reliefs sought and the law applicable. If courts allows such incompetency to prevail on pretext of "overriding principle objective" no one will stop parties to move courts by citing any provision of the law of their own choice. When we get there, the

rules of procedure will no longer be meaningful and that is when every court will decide to follow what it wants and the net result will be violence in this palace of justice.

That said, I hold that the preliminary objection regarding the wrong citation of the enabling provision is meritorious and it is therefore sustained. Since this objection alone suffices to dispose of the application, I hereby do the same by striking it out with costs.

It is so ordered.

A.R. Mruma,

Judge.

Dated at Dar Es Salaam this 24th August 2022