IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

MISC. LAND APPLICATION NO. 143 OF 2021

(Arising from Land Appeal No. 52 of 20019 of the High Court of Tanzania Bukoba Registry, Original from Land Application No. 100 of 2016 of Muleba District Land and Housing Tribunal)

RICHARD KABAKAMA..... APPLICANT

VERSUS

LAMECK TWINOMUKAMA..... RESPONDENT

RULING

Date of Ruling: 19.08.2022
A.Y. Mwenda, J

The present ruling is in respect of the preliminary objection raised by the counsel for the respondent. The applicant filed the present application seek extension of time to lodge appeal. Upon receipt of the chamber summons and affidavit, the respondent issued a notice of preliminary objection with five (5) points to wit;

1. That the application is incompetently defective for containing grounds of appeal instead of the subject matter to be present for. (sic)
2. That the chamber summons is incurably defective for being filed relying on a non-existing section of the law.
3. That the chamber summons is incurably defective for being incomplete as it have interparte without disclosing exparte prayers.

4. That the affidavit for the applicant is incurably defective for containing points of law against rules governing affidavits.
5. That the verification contained in affidavit for the applicant is incurably defective for verifying paragraphs which are not pleaded in the said affidavit, and hence lacks verification. (sic)

It is trite law that once preliminary objection is filed the court has to consider it first before resorting to the merits of the application. See KHAJI ABUBAKAR ATHUMAN VS. DAUD LYAKUGILE TA DC ALUMINIUM AND ANOTHER, CIVIL APPEAL NO. 86 OF 2018, CAT (unreported).

When this matter was called on for hearing the applicant appeared in person without legal representation whilst, the respondent enjoyed the legal services from Mr. Seth, learned counsel.

When invited to submit in respect of the preliminary objection, Mr. Seth informed the court that he was going to argue the first (1st) and fourth (4th) points of objection together, abandon the third (3rd) point of objection and argue the second (2nd) and fifth (5th) points separately.

In respect of the first (1st) and fourth (4th) preliminary points of objection, Mr. Seth submitted that the applicant's affidavit contain grounds of appeal instead of facts. He made reference to paragraphs (ii), (iii) and (iv). He submitted that the said

affidavit contains points of law which is fatal. On top of that he submitted that even the applicant's chamber affidavit contain points of law especially paragraph (ii). He said this is fatal and in support thereof he cited the case of JAMAL MKUMBA AND ANOTHER VS. ATTORNEY GENERAL, CIVIL APPLICATION NO. 240/01 OF 2019 CAT (unreported).

In respect to the fifth (5th) point of objection the learned counsel submitted that the verification clause is defective. He said the verification clause is in respect of paragraphs which do not exist. He added in that while the contents of the affidavit are numbered in roman, the verification clause refers to paragraphs in Arabic numbers. He thus prayed this point of objection to be sustained and in support thereof he cited the case of JAMAL S. MKUMBA AND ANOTHER (supra) at page 11.

With regard to the second (2nd) point of objection the learned counsel submitted that the enabling provision in the chamber summons in non-existing. He said the applicant cited S.1191 which does not exist in the appellate jurisdiction Act, [Cap 141 RE 2019].

The learned counsel then concluded his submission with a prayer beseeching this court to strike out this application with costs.

Responding to the submissions by the learned counsel for the respondent, the applicant beseeched this court to adopt his reply to the preliminary objection of essence in the applicant's reply to the preliminary objection in paragraph two (2) in which he stated that;

> *(2) "That, the chamber summons is curable as the typing error (sic) citing wrong provision where order sought exist (sic), the irregularity or emission (sic) can be ignored and the court may order the correct law to be inserted (sic)."*

Having said so, he prayed the respondent's preliminary objection to be overruled.

In rejoinder Mr. Seth submitted that the applicant alleges that the error in enabling section in the chamber application is a typing error but failed to state what is the correct section. The learned counsel asserted that the applicant ought to be certain with what he is looking for and not to burden the court with the task of finding for the relevant section for him. He thus repeated to his previous prayer beseeching the court to strike out this application.

That being the summary of the submissions by the parties, the task before this court is to determine the merits of the present preliminary objection.

As I have stated above, the respondent through the services of Mr. Seth, raised a number of points which according to him, renders the present application incompetent. These are failure to cite a proper enabling provision of the law in the chamber application, his affidavit containing grounds of appeal instead of points of facts and the verification clause verifying paragraphs which are not pleaded in the affidavit.

Beginning with wrong citation of enabling provisions, whilst the counsel for the respondent is of the view that it is incurably defective, the applicant on his part asserts that it can be amended to insert the correct provision. As was rightly pointed by Mr. Seth, the applicant did not state what the proper citation is. This court is aware that the proper citation is section 11(1) of the appellate jurisdiction Act, Cap 141. It is trite law that wrong citation of law or rule renders the application in competent. In the case of CHINA HENAN INTERNATIONAL CO-OPERATION GROUP VS. SALVAND K.A RWEGASIRA, CIVIL REFERENCE NO. 22 OF 2005, CAT, unreported, the court while citing the case of ALOYCE MSELLE VS. THE CONSOLIDATED HOLDING CORPORATION, CIVIL APPLICATION NO. 11 OF 2002 held that;

> *"...there is an un broken chain of authorities of this court to the effect that wrong citation of a provision of law under which an application is made renders that*

application incompetent, such decision include NBC VS. SADRUDIN MEGHJI, CIVIL APPLICATION NO. 20 OF 1997, RUKWA AUTOPARTS LTD VS JESTINA G. MWAKYOMA, CIVIL APPLICATION NO. 45 OF 2000, and CITIBANK (T) LTD VS. TTCL AND OTHERS, CIVIL APPLICATION NO. 65 OF 2003. So, Mchome, J should not have granted leave to appeal."

From the foregoing. I find merits in the 2nd preliminary objection and it is thus sustained.

With regard to objection that the applicants affidavit containing grounds of appeal instead of the facts, the court have revisited the applicant's affidavit and noted paragraph (ii), (iii), (iv) and (v) are grounds of appeal and not facts. The said paragraphs reads that;

1. That, the applicant in this same application was appellant and respondent in the High Court and in the District Tribunal thus conversant with facts going to depose hereunder. A copy of judgment enclosed as annex RK1 forming part this affidavit. (sic)
2. That, the first appellate court err in law and facts to hold that the decision of the trial tribunal was proper while the same did not state the location and size of land being encroached to vitiating the whole processing fatal. (sic)

3. That, the first appellate court err in law and facts not to consider the appellant allegations that the respondent is not neighbor to the appellants land thus lacking locus stand to claim land of late REV. Aron Buntuntu while claiming to uproot the mikonge boundaries he did not participate to affix. (sic)
4. That, the first appellate court err in law and facts contending that the appellant allegations that the trial tribunal was biased against him in favor of respondent without considering his evidence and witnesses was property evaluated despite the fact that the same disagree with the chairmen of the trial tribunal on reasons for not relying on the agreement of 2010. But upon admitting the same exhibit did not consider it. A copy of agreement of 2010 enclosed as annex RK2 forming prt of this affidavit. (sic)
5. That, the whole processing of the first appellate court and that of the trial District Tribunal were tainted with illegalities, misconception of facts all need to be corrected while putting things into normal. (sic)

Looking at the contents of the above produced paragraphs, it is evident that they do not fall within the ambit of order XIX Rule 3(1) of the Civil Procedure Code, [Cap 33, RE 2019] which reads;

> *3(1) "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except*

on interlocutory applications on which statements of his belief may be admitted."

The above mentioned paragraphs are grounds of appeal which contain legal arguments and conclusion. In the case of JAMAL S. MKUMBA AND ANOTHER VS. ATTORNEY GENERAL, CIVIL APPLICATION NO. 240/01 OF 2019 CAT (unreported) the court, while citing the case of UGANDA VS. COMMISION OF PRISON EXPARTE MATOVU [1966] EA 514 held;

"As a general rule of practice and procedure an affidavit for use in court being a substitute for oral evidence, it should only contain statement to which the witness disposes either of his own knowledge or such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion."

Regarding consequences, in the case of JAMAL MKUMBA AND ANOTHER (supra) the court, while citing the case of CHADHA AND COMPANY ADVOCATES VS. ARUNABEN CHAGGAN CHHITA MISTRY AND 2 OOTHERS, CIVIL APPLICATION NO. 25 OF 2013 held;

"where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of

the affidavit remaining intact so that the court can proceed to act on it."

With the guidance of the authority above, paragraphs (ii), (iii), (iv) and (v) of the applicants affidavit are expunged. Having expunged these paragraphs the present applicant lacks no legs to stand on and consequently it is strike out with costs.

It is so ordered.

A.Y. Mwenda

Judge

19.08.2022

Ruling is delivered in chamber under the seal of this court in the presence of the Applicant and in the absence of the Respondent.

A.Y. Mwenda

Judge

19.08.2022