IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 654 OF 2018

(Arising from the Misc. Civil Application No. 286 of 2018)

PRISTINE PROPERTIES LIMITED....................APPLICANT

VERSUS

SEYANI BROTHERS & CO. (T) LIMITED.........RESPONDENT

RULING

Date of Last Order: 9/7/2021

Date of Ruling: 22/02/2022

S.M. KULITA J;

This is a ruling on the Preliminary Objection on point of law raised by the Respondent's Counsel Mr. Beatus Malima on the following grounds;

1. That the application is bad in law for non-citation of the correct enabling provision of the law.
2. That the application contravenes the provisions of section 5(2)(d) of the Appellate Jurisdiction Act [Cap 141 RE 2002].

The matter was argued by way of written submissions. The scheduling orders for filing the submissions in respect of the

preliminary objection for both parties was fixed. While the Respondent is represented by Mr. Beatus Malima and Mr. Denice Tumaini from Mawalla Advocates, the Applicant enjoys the legal services of Mr. Ashiru Hussein Lugwisa, Advocate from Yakubu & Associates Chamber.

In his written submission in respect of the 1st ground of the Preliminary Objection Advocate for the respondent, Mr. Tumaini stated that the application is bad in law for non-citation of the correct enabling provision. He said that Rule 45(a) of the Court of Appeal Rules, 2009 and Order XLII, Rule 1(2) of the Civil Procedure Code [Cap 33 RE 2019] are not the correct provisions for moving this court to entertain this application to appeal at the Court of Appeal against the decision of this court in the Misc. Civil Application No. 286 of 2018 from which this application arises.

The Advocate explained that section 5(1)(c) of the Appellate Jurisdiction Act [Cap 141 RE 2019] which empowers this court to entertain the application for leave has not been cited in the chamber summons. He stated that it is a principle of law that wrong citation renders the application incompetent. He cited some cases to cement his argument which includes; CHINA HENAN INTERNATIONAL CO-OPERATION GROUP V. SALVAND RWEGASIRA [2006] TLR 220 and MAJURA MAGAFU AND PETER

SWAI V. THE MANAGING EDITER, MAJIRA NEWSPAPER AND ANOTHER, Civil Application No. 203 of 2013, CAT at DSM (unreported). For the said alleged fault Mr. Tumaini prayed for the application to be struck out.

Submitting on the 2nd ground of the Preliminary Objection Mr. Tumaini stated that the application contravenes the provisions of section 5(2)(d) of the Appellate Jurisdiction Act [Cap 141 RE 2019]. He said that the matter that the applicant intends to appeal is not appealable for being an interlocutory order, that it has no effect of determining the matter to the finality. The Counsel cited the cases of JUNACO (T) LTD & ANOTHER V. HAREL MALLACK TANZANIA LTD, Civil Application No. 473/6 of 2016, CAT at DSM (unreported) and A-ONE PRODUCTS AND BOTTLERS LTD V. TECHLONG PACKAGING MACHINERY LTD AND ANOTHER, Commercial Case No. 105 of 2017, HC Commercial Division at DSM (unreported) to support his argument that the matter originates from the order which is interlocutory, hence not appealable.

In his reply submission the Applicant's Counsel, Mr. Ashiru Hussein Lugwisa stated that the argument that the application should be struck out for non-citation of the proper enabling provision of the law, which is the 1st ground of Preliminary Objection, is overtaken by event. He said that the introduction of *"Overriding Objective"*

principle under Section 3A(1) and (2) of the Civil Procedure Code directs the courts to rely on substantive justice instead of dwelling on technicalities in making decisions, as long as the issue does not go to the root of the case. He said that despite the non-citation of that said provision, nothing will be affected on the Respondent's side as there is no dispute that he knows that the Applicant is seeking for leave to appeal at the Court of Appeal against the decision of this court in the Misc. Civil Application No. 286 of 2018.

Replying the 2nd ground of Preliminary Objection the Applicant's Counsel admits that interlocutory orders are not appealable as per section 5(2)(d) of the Appellate Jurisdiction Act [Cap 141 RE 2002]. However, he added that the decision of this court in Misc. Civil Application No. 286 of 2018 that he intends to appeal is not interlocutory, hence subject to appeal. He said that the current matter being an application for leave to appeal is proper before the court as the decision of this court in Misc. Civil Application No. 286 of 2018 determined the matter to the finality. He said that the Applicant has no another forum to challenge that decision apart from the Court of Appeal. The Counsel cited the case of JUNACO (T) LTD & ANOTHER V. HAREL MALLACK TANZANIA LTD, Civil Application No. 473/6 of 2016, CAT at DSM (unreported) to support his argument.

The counsel concluded by inviting this court to overrule the Preliminary Objections.

In rejoinder the Respondent's Counsel reiterated what he had submitted in his submission in chief.

In my analysis, starting with the 2nd ground of the Preliminary Objection, I can agree with Mr. Tumaini that under section 5(2)(d) of the Appellate Jurisdiction Act [Cap 141 RE 2002] the appeal can only lie against the decision that has the effect of determining the matter to the finality, that there is no appeal against interlocutory orders. This was also held in **A-ONE PRODUCTS AND BOTTLERS LTD V. TECHLONG PACKAGING MACHINERY LTD AND ANOTHER, Commercial Case No. 105 of 2017, HC Commercial Division (unreported).**

The issue to be determined here is whether the court's decision in Misc. Civil Application No. 286 of 2018 is interlocutory. Upon going through the ruling for the said Misc. Civil Application No. 286 of 2018 High Court Dar es Salaam District Registry which is the original case, I have noticed that the trial Judge did struck it out as a whole. As the matter has been fully determined to the finality, there is no venue for that said case to proceed before this court. **Section 5(2)(d) of the Appellate Jurisdiction Act** provides;

"Notwithstanding the provisions of subsection (1), no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit"

In **JUNACO (T) LTD & ANOTHER V. HAREL MALLACK TANZANIA LTD, Civil Application No. 473/6 of 2016, CAT at DSM (unreported)** at page 12 – 13 the Court applied the so called *"the nature of order test"* whose aim was determining whether the judgment or order complained of finally disposed of the rights of the parties. If the answer is in affirmative, then it must be treated as the final order. If it does not, it is therefore an interlocutory order.

As for the matter at hand, the decision of the original case from which this application arises, ie. Misc. Civil Application No. 286 of 2018 is not interlocutory. It has the effect of final order. When the matter is finally determined the only option available is to appeal, hence the applicant in this matter is right to lodge this application for leave to appeal to the Court of Appeal as he could not do so without obtaining leave from this court. It is a step towards filing appeal. Thus, the fact that the court's decision in Misc. Civil Application No. 286 of 2018 is not interlocutory, but final decision,

it can only be challenged by way of appeal at the Court of Appeal and what the applicant has done is just a step towards thereto. I find this ground of Preliminary Objection has no merit, hence overruled.

As for the 1st limb of Preliminary Objection, which states that the application is bad in law for non-citation of the correct enabling provision of the law, I have this to say; I went through the Chamber summons and noticed that the applicant moved this court under section 45(a) of the Tanzania Court of Appeal Rules, 2009 as amended by Rule 6 of the Tanzania Court of Appeal (amendments) Rules, 2017 and Order XLII, Rule 1(2) of the Civil Procedure Code [Cap 33 RE 2002]**.** While **section 45(a) of the Tanzania Court of Appeal Rules** provides for a time limit and mode in which the applicant can file application for leave, **Order XLII, Rule 1(2) of the Civil Procedure Code** provides that the application should be made by way of chamber summons. I find all these provisions relevant for the matter at hand, they have been cited and fully complied with by the Applicant. However, the applicant has not cited the enabling provision which is **section 5(1)(c) of the Appellate Jurisdiction Act.** The said section provides;

> *"In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie*

to the Court of Appeal with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court"

In arguing this issue the Respondent's Counsel submitted that such defect renders the application incompetent, hence liable to be struck out. He cited some cases to strengthen his argument. On the other hand the Applicant's Counsel conceded that the said section has not been cited but such fault is curable through *Overriding Objective*.

The issue here is whether non-citation of the enabling provision leads to the struck out of the matter. Actually, it is a position of the law. The chamber summons transpires that the applicant has not cited the enabling provision of the law which is section 5(1)(c) of the Appellate Jurisdiction Act. It is a principle of law that wrong citation or failure to cite it renders the application incompetent. This was held by the Court of Appeal in **CHINA HENAN INTERNATIONAL CO-OPERATION GROUP V. SALVAND RWEGASIRA [2006] TLR 220.** The court had the same view in **MAJURA MAGAFU AND PETER SWAI V. THE MANAGING EDITER, MAJIRA NEWSPAPER AND ANOTHER, Civil Application No. 203 of 2013, CAT at DSM (unreported).**

The Applicant's counsel, Mr. Lugwisa admitted to have not cited the enabling provision of the law and requested the court to use the *Overriding Objective* principle to cure the defect. But introduction of the *"Overriding Objective" (oxygen principle)* under **Section 3A(1) and (2) of the Civil Procedure Code** which was enacted through **section 6 of the Written Laws (Miscellaneous Amendments) (Act No. 8 of 2018)** requires the courts to rely on substantive justice in making decisions instead of dwelling on technicalities, applies only where the issue does not go to the root of the case. **The Appellate Jurisdiction Act [CAP 141 R.E. 2002] at section 3A(1) and (2)** which was enacted through **the Written Laws (Miscellaneous Amendments) (Act No. 8 of 2018) at section 4** also enjoins the courts to do away with technicalities, instead they should determine cases justly. All these provisions serve the same purpose.

On this, the applicant's argument does not hold water, as the court cannot act blindly where the provisions of the law clearly stipulate the procedures to be complied with. In some of its cases the Court of Appeal declared this legal position in respect of the extent in which the rule of *overriding objective* can be invoked, that it should not apply in blindly in disregard of the rules of procedure coached in mandatory terms. Some of those cases include **MONDOROSI**

VILLAGE COUNCIL & 2 OTHERS V. TANZANIA BREWERIES LIMITED & 4 OTHERS, Civil Appeal No. 66 of 2017 CAT at Arusha (unreported) in which it was held;

> *"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case"*

In a case of **SGS SOCIETE GENERALE DE SURVEILANCE SA & ANOTHER V. VIP ENGINEERING & MARKETING LTD & ANOTHER, Civil Appeal No. 124 of 2017 CAT at DSM** (page 23) the court had this to say;

> *"The amendment by Act No. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of the court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case."*

The Court of Appeal had the same view in **MARTIN KUMALIJA & 17 OTHERS V. IRON & STEEL LTD, Civil Application No. 70/18 of 2018, CAT at DSM (unreported).** It means the principle of *overriding objective* does not apply where the fault touches the root of the case.

I thus find this ground of Preliminary Objection meritorious, that the chamber summons is defective for non-citation of the proper enabling provision of the law.

As this ground of the Preliminary Objection is sufficient to dispose of the matter, I hereby strike out the application. Applicant to bear the costs.

S.M. KULITA

JUDGE

22/02/2022