IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 89 OF 2021

(Arising from Land Appeal Case No. 60 of 2020 of the High Court of Tanzania Bukoba Registry, Original from Application No. 80 of 2017 of Muleba District Land and Housing Tribunal)

VALERIAN MOSES BANDUNGI..... APPLICANT

VERSUS

1. GOZBERT CLEOPHACE ..... 1ST RESPONDENT

2. BAPTIST CONVENTION OF TANZANIA..... 2ND RESPONDENT

RULING

25/01/2022 & 08/02/2022

NGIGWANA, J.

The applicant in this application has on 19th day of August, 2021 filed this application by way of chamber summons made under Order IX rule 9 of the Civil Procedure Code Cap. 33 R: E 2019 supported by affidavit deponed by him, seeking for the following orders;

(i) *That this honourable court be pleased to set aside the ex-parte judgment and decree delivered on 30/07/2021 by Hon. Mgetta, J.*

(ii) *Any other order and relief as the Honourable Court may deem fit and just to grant.*

Upon being served with the chamber summons, the Respondent on 24th day of September 2021, filed his counter affidavit together with the notice of Preliminary objection on points of law.

It is trite that when a party raises preliminary objections, such objections must be dealt with before dealing with the main application.

Briefly, the preliminary points of law raised by the Respondent are as follows;-

1. *That, the application is in competent at law for being filed without being accompanied by the decree of which the application is hinged and on which it is intended to be set aside.*
2. *That the honourable court is not properly moved to hear and determine the application on cited provisions of law and thus lacks jurisdiction.*
3. *That, the presiding Honourable Court Judge being the judge who never passed the decree is not vested with powers to set aside the decree passed by his brother judge of the same court.*

On the basis of the above grounds, the Respondents, pray for the dismissal of the application with costs. On 30/11/2021, when the matter was called on for hearing, the respondents were represented by Mr. Frank Karoli, learned advocate while the applicant was represented by Mr. Derick Zephurine, learned advocate.

Before commencing the hearing, the respondent, through his advocate abandoned the 1st and 3rd points of preliminary objection, and remained with just one point that, **the Honourable court is not properly moved to hear and determine the application on the cited provision of law and this lacks jurisdiction.**

Arguing the P.O, Mr. Frank Karoli stated that, Order IX rule 9 of the Civil Procedure Code Cap. 33 R: E 2019 is applicable only where the suit

dismissed was the original case instituted by plaint. That in the present application, the judgment which is sought to be set aside is Land Appeal Case No. 60 of 2020, thus it is not an original suit, and for that matter, the court has not been properly moved.

Mr. Karoli further submitted that, wrong citation of the provision of the law is fatal and cannot be cured by invoking the principle of overriding objective.

Reacting, Mr. Derick strongly argued that the provision cited is very proper therefore, the objection raised is baseless. He added that the issue here is not the parties to the case but the orders issued by the court. He challenged Mr. Karoli for not mentioning the proper provision (if any) under which the court ought to have been moved. He further stated that, even where there is non-citation or wrong citation, the current position of the law is very clear that wrong citation of the law is curable following the introduction of the Principle of Overriding Objective. He made reference to the case of **Shear Illusions Ltd versus Christina Ullawe Umiro**, Civil Appeal No. 114 of 2014 CAT (Unreported). He ended his submission urging the court to overrule the objection for want of merit, and grant the application so that the matter can be heard interparties since the right to be heard is so fundamental.

In his brief rejoinder, Mr. Karoli, reiterated his submission in chief and added that the applicant ought to have cited Order XXXIX rule 21 of the Civil Procedure Code Cap. 33 R: E 2019. He conceded on the existence of Overriding Objective principle, but pointed out that, the principle is not a panacea to every procedural irregularity, especially where the irregularity

committed by an advocate who knows both substantive and procedural law.

Having heard the contending submissions of the advocates for the parties on this P.O, the crucial issue for determination is whether the objection raised is meritorious or otherwise.

In the application at hand, the chamber summons was drawn and filed by Mr. Derick Zephurine, learned advocate for the applicant. As stated earlier, it was made under Order IX rule 9 of the Civil Procedure Code Cap. 33 R: E 2019.

Rule 9 (1) provides that-

"*Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but he may apply for an order to set the dismissal order aside and, if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit*".

Order IX rule 8 of the Code provides that-

"*Where the defendant appears and the plaintiff does not appear when the suit is called for hearing, the court shall make an order that the suit be dismissal unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder*".

Undoubtedly, the hearing of Land Appeal Case No. 60 of 2020 originating from Application No. 80 of 2017 of Muleba District Land and Housing Tribunal proceeded exparte on 26/07/2021 following the non-appearance of the respondent now Applicant.

On 30/07/2021 the exparte judgment which is the subject of this application was handed down. In that respect, this court was not exercising its original jurisdiction but Appellate jurisdiction.

The appellants (now respondents) entered appearance through Mr. Aaron Kabunga assisted by Mr. Frank Karoli, both learned advocates, thus there was nothing like dismissal order for non-appearance.

In that respect, it is clear that the applicant has wrongly moved this court by citing the wrong provision of the law. It is unfortunate that the applicant's advocate did not concede in his submission that there was wrong citation of the law, instead, he strongly insisted that the citation was proper.

Indeed, I shake hands with Mr, Frank Koroli, learned counsel for the respondents that the applicant has cited the wrong provision of the law The applicant ought to have cited Order XXXIX rule 21 of the Civil Procedure Code Cap. 33 R: E 2019 which provides that: -

"*Where an appeal is heard exparte and judgment is pronounced against the respondent, he may apply to the court to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him*".

The very known position of the law is that, wrong citation and/or non-citation of the enabling provisions renders the application incompetent. For instance, in the case of **Hussein Mgonja versus The Trustees of the Tanzania Episcopali Conference**, Civil Revision No. 02 of 2002 CAT (unreported) the Court of Appeal when striking out an application on the ground of incompetence had this to say;

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

The gravity of the error in citing a wrong provision of the law was stated in the case of **China Henan International Co-operation Group versus Salvand K.A. Rwegaira** [2006] TLR 220 where the Court of Appeal of Tanzania held that –

"*here the omission in citing the proper provisions of the rule relating to a reference and worse still error in citing a wrong and in applicable 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*".

This court is alive of the **Principle of Overriding Objective** also known as the "**Oxygen Principle**" which was introduced in our law vide the Written Laws (Miscellaneous Amendments) Act No. 8 of 2018. The principle demands courts to consider substantive justice as opposed to legal and procedural technicalities. That therefore means wrong citation or non-citation of the enabling provision is curable depending on the circumstances of each case.

However, it should be noted that the said principle cannot be blindly invoked especially in situations where the non-compliance goes to the root of the matter. In the case of **SGS Societe Generale de Serveillance SA and Another versus VIP Engineering & Marketing Ltd and Another**, Civil Application, Civil Appeal No. 124 of 2017 (unreported) the Court of Appeal held that;

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

It must be noted that in this application, Derick Zephurine, did not concede that there was improper citation of the enabling provisions thus has not convinced the court to invoke Overriding Objective Principle. From the above stated position, it is my conclusion that the court was wrongly moved by the applicant, and for that matter, the application is incompetent. However, bearing in mind the interest of justice, and the nature of the application, and this court finds it proper to sustain the objection, and struck out the application for being incompetent but with leave to refile.

In the event, the objection raised is hereby sustained. I proceed to strike out the application for being incompetent. The applicant is at liberty to file a proper application within 14 days from the date of this ruling. It is so ordered.

E.L. NGIGWANA

JUDGE

08/02/2022

Ruling delivered this 8th day of February, 2022 in the presence of the Applicant and 1st respondent in person, Onesmo Rweyemamu Samwel (Pastor) for 2nd Respondent, Mr. E.M. Kamaleki, Judges' Law Assistant and Mr. Antony Kithama, B/C.

E.L. NGIGWANA

JUDGE

08/02/2022