

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

Misc. LAND APPLICATION No. 52 OF 2021

*(Arising from the High Court (Musoma District Registry) in Misc. Land
Application No. 59 of 2020)*

HASSANI YUSUPH SATARA APPELLANT

[Administrator of the Estates
of the late Yusuph Zaza Satara]

Versus

**1. THE ATTORNEY GENERAL &
2. MINISTER OF WORKS, TRANSPORT
AND COMMUNICATION** } **RESPONDENT**

RULING

01.03.2022 & 01.03.2022

Mtulya, F.H., J.:

In 2018, the Parliament in the United Republic of Tanzania inserted the principle of overriding objective (the principle) in the **Civil Procedure Code** [Cap. 33 R. E. 2019] (the Code) via section 6 of the **Written Laws (Miscellaneous Amendment) Act, No. 8 of 2018**. The principle is displayed in section 3A and 3B of the Code. Generally, the principle requires courts of law, learned minds who appear in civil suits and parties to civil disputes to concentrate in facilitating justice in favour of substantive justice.

The principle was well-welcomed by this court and Court of Appeal and has been invited now and then for consideration in

various points of preliminary objection raised in our courts (see: **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017, **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017, **Mandorosi Village Council & Others v. Tuzama Breweries Limited & Others**, Civil Appeal No. 66 of 2017 and **Njoka Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017).

However, the practice of the Court of Appeal has shown that the principle cannot be invited and applied blindly (see: **District Executive Director, Kilwa District Council v. Bogeta Engineering Company**, Civil Appeal No. 37 of 2017) or against the law (see: **Mandorosi Village Council & Others v. Tuzama Breweries Limited & Others** (supra) and **Mariam Samburo v. Masoud Mohamed Joshi & Two Others**, Civil Appeal No. 109 of 2016).

On 27th day of September, last year, our superior court stated that: *the principle is not the ancient Greek goddess of universal remedy called Panacea* (see: **Juma Busia v. Zonal Manager, South Tanzania Postal Corporation**, Civil Appeal No. 243 of 2020). In order to appreciate the position of the Court of Appeal, and for purposes of understanding the principle the following text extracted at page 9 of the precedent in **Juma Busia v. Zonal Manager, South Tanzania Postal Corporation** (supra) is displayed hereunder:

*The principle of overriding objective is not the ancient Greek goddess of universal remedy called Panacea, such that its objective is to fix every kind of defects and omissions by parties in courts. The principle cannot be invoked where the proceeding subject of determination of a dispute before the court was filed or lodged out time. That is so because, where a proceeding is lodged out of time the court or forum before which it is pending, has no jurisdiction to entertain the proceeding. So, **for the court to invoke any powers, not only the Principle of Overriding Objective, it must first have jurisdiction to preside over the matter.** If it does not have jurisdiction to resolve a dispute or determine a matter before it, the only jurisdiction or power that court has, is to strike out the proceeding. In the case of **District Executive Director, Kilwa District Council v. Bogeta Engineering Limited**, Civil Appeal No. 37 of 2017, this Court observed on the same subject.*

Today, in the present application, the respondent raised two (2) points of preliminary objection protesting the competence of this court to proceed with the hearing of the application. On first point the respondent contends that this court was improperly moved by failure to cite relevant enabling provision of the law; and second, the

application was supported by detective affidavit which bears a defective format of attestation in the affidavit.

After a full hearing of submissions of the parties, learned minds Mr. Saddy Rashid for the respondent and Mr. Chama Matata for the applicant, two (2) decisions were invited in this court namely, **Alphonse Dionezio Boniphace v. Shirika la Upendo na Sadaka**, Labour Revision No. 8 of 2021 decided by this court and **Yakobo Magoiga Gichere v. Penina Yusuph**, Civil Appeal No. 55 of 20217 determined by the Court of Appeal in this country.

Following the cited precedents, the parties' learned minds agreed that the cited defects which were protested at the preliminary stages in the present application may be remedied by the principle. However, the enactment in section 3A & 3B of the Code and interpretations of the principle are silent on whether the court can proceed with the defects or order an amendment to the pleadings, and if so within the application of filing of the fresh and proper suit.

According to Mr. Saddy, the cited decision in **Alphonse Dionezio Boniphace v. Shirika la Upendo na Sadaka** (supra) offers a reply at page 15 of the decision which displays that: *the applicant may as such amend the a normally, if he so wishes*, whereas Mr. Chama thinks that the points of objection similar to the present ones

were overruled in the cited precedent hence this court may order amendment in favour of substantive justice.

In my considered opinion, when the law and practice are certain and settled, this court cannot be detained in search of new positions. The law in section 3A & 3B of the Code and cited precedents are settled. I do not need to disturb them, and in any case, I have no such mandate to do so, even if there are plausible explanations.

However, I am asking myself as to whether this court can proceed with the hearing of the application with defective affidavit, though may be cured by the principle. In any case, the present application, did not cite wrong provision of the law, but non existing provision of the law. I am aware there is that school of thought in this court which thinks that the court can proceed even in absence of any citation of enabling provision of the law. However, I am not in favour of the position especially when we have learned counsels engaged in disputes filed in this court.

In my view, and considering the present defects, I hereby invite the principle, but I cannot proceed with defective application as this is a court of record and is mandated to ensure proper application of laws and precedents emanated in the Court of Appeal (see: **Diamond Trust Bank Tanzania Ltd v. Idrisa Shehe Mohamed**, Civil

Appeal No. 262 of 2017). In the present application this court was not moved at all as there is no any citation of enabling provision.

Having said so, I have decided to strike out the application for want of proper record in this court. However, as I noted the principle in favour of substantive justice, I grant the applicant fourteen (14) days' leave to bring fresh and proper application without any further delay. I award no costs in the present application as the dispute is yet to be determined to the finality on merit.

Ordered accordingly.

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F. H. Mtulya

Judge

01.03.2022

This Ruling is delivered in Chambers under the seal of this court in the presence of the applicant, Mr. Hassan Yusuph Satara and his learned counsel, Mr. Chama Matata and in the presence of Mr. Saddy Rashid and Mr. Samwel Lukelo, learned Senior State Attorneys.

A handwritten signature in blue ink, consisting of stylized cursive letters, with a long horizontal flourish extending to the right.

F. H. Mtulya

Judge

01.03.2022