IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. LAND APPLICATION NO. 58 OF 2021

(C/f Land Appeal No. 22 of 2020 in the High Court of Tanzania at Arusha Registry; Original Application No. 117 of 2014 at the District land and Housing Tribunal of Arusha at Arusha)

SEVERINE A. MALLYA.....1ST APPLICANT

JOVITA P. MSELLE..... 2ND APPLICANT

VERSUS

CHARLES WILLIAM (Legal representative of

the late **William Kichao) ..... RESPONDENT**

RULING

29/03/2022 & 31/03/2022

KAMUZORA, J.

This is an application for leave to appeal to the Court of Appeal brought under Section 47(1) of the Land Disputes Courts Act No. 2 of 2002, [Cap 216 R. E 2002] (sic). It is supported by an affidavit sworn jointly by the applicants. In opposing the application, a counter affidavit thereof deponed by the counsel for respondent was filed together with a notice of preliminary objection which read as follows: -

That, the Honourable court is not properly moved because of the wrong citation of the enabling provision of the law.

On the date scheduled for hearing of the preliminary objection the applicants were represented by Mrs Aziza Shakale while the respondent enjoyed the service of Mr Dacan Oola both learned advocates.

When the counsel for the parties were called upon to submit on the preliminary objection the counsel for the applicant quickly conceded to the raised point of objection and prayed for the court to invoke the provision of section 3 of the Civil Procedure Code and apply the overriding objective to allow the applicant to amend the provision of the law cited. The counsel was of the view that the amendment will not prejudice the respondent as the new enactment of law contained the same provision as the old law. To cement her argument, she cited the case of **Ernest Jackson @ Mwandikaupesi & another vs the Republic,** Criminal Appeal No 408 of 2019 CAT at DSM (Unreported) where the court stated that citing the amended law is an error which can be corrected.

On the side of the respondent Mr. Oola submitted that it is not only that the law, Act No. 2 of 2002 was amended but also the provision of section 47(1) of the new law is not applicable in the present

circumstance. The counsel insisted that if at all he has not filed the objection he would have agreed to the remedy that the counsel for the applicant is praying for. He went on and submitted that, the counsel for the applicant sought refuge before the respondents counsel could submit on the objection. The counsel was of the view that, after the preliminary objection is filed regarding an error which goes to the root of the application the remedy is to strike out the application.

Mr Oola also submitted that the criminal case cited by the counsel for the applicant had no intention of hijacking the preliminary objection filed in court. He insisted that the error goes to the root of application as the cited law and the provision is inapplicable in this application. He thus pray for this court to strike out the application with costs for the applicants to follow proper procedures.

In rejoinder submission Mrs. Shakale added that, she had admitted to the citing of the old law but insisted that the purpose of the overriding objective is to avoid unnecessary objections like the present one and assist the parties to amend and the case to proceed on merit. She reiterated her prayer of invoking section 3 of the CPC on overriding objective principle for this court to allow the amendment with no order for costs.

Having heard the submissions by the parties, there is no dispute to the fact that the application before this court was brought under the wrong provision of the law. The issue that stands for this court to resolve is whether or not the wrong citation of enabling provision is an error which is curable under the overriding objective principle.

From the record it is clear that the application before this court is for leave to appeal to the Court of Appeal of Tanzania against the decision of this High Court in Land Appeal No. 22 of 2020. The applicant moved this court with Section 47(1) of the Land Disputes Courts Act No 2 of 2002 Cap 216 R. E 2002 which provides that,

> *" Any person who is aggrieved by the decision of the High Court (Land Division) in the exercise of its* ***original, revisional or appellate jurisdiction,*** *may with the leave from the High Court (Land Division) appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act".*

That provision was amended and a new provision of section 47 (1) Revised Edition 2019 read as follows: -

> *"A person who is aggrieved by the decision of the High Court in the exercise of its* ***original jurisdiction*** *may appeal to the Court*

of Appeal in accordance with the provisions of the Appellate Jurisdiction Act."[Emphasis mine]

The applicants counsel upon conceding to the wrong citation urged this court to consider that even under the new enactment the wording of the sections are still the same. I agree with Mrs. Shakale that the amendment contains the provision relevant to the present application and that is section 47 (2) of the Act which read: -

"A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal."

However, it is my observation that, the enabling provision totally changed from 47 (1) to 47 (2) thus, it is not only the matter of citing wrong law or amended law but also wrong provision of the law because under the new law, section 47(1) does not deal with application like the present one. The wording of the two sections does not cover for the same thing as the new enactment only provides for where this court is in exercise of its original jurisdiction while under the old law it provides the situation under which this court is either dealing with original, revisional or appellate jurisdiction. This makes the case of **Ernest**

Jackson Mwandikaupesi (supra) cited by the applicant distinguishable from the facts of this case.

It is a trite law that a party who cites the provision of law as enabling provision to the application or suit must specify by citing exactly the relevant provision. From the case of **Marmo Slaa @ Hofu & 3others v The Republic,** Criminal Application No. 3 of 2012 CAT at Arusha (Unreported) the court cited with approval the case of **Edward Bachwa & 3others Vs. The Attorney General & another**, Civil Application No. 128 of 2006 (Unreported) where the Court of Appeal held that,

> *".... The answer is found in an unbroken chain of authorities to the effect that* ***wrong citation of the law, section, sub-section and /or paragraphs of the law or non-citation of the law will not move the court to do what it is asked and renders the application incompetent."*** (Emphasis original)

See also the case of **Alli Chamani V Annat Tinda**, Civil Application No. 410/4 of 2017 CAT at Bukoba, **African Banking Corporation(T) Ltd V George Williamson Limited**, Civil Application No. 67 of 2017 CAT at DSM all Unreported. It was also held in the case of **China Henan International Co-operative Group vs. Salvand**

K.A Rwegasira [2006] TLR 220 that, wrong citation goes to the root of the matter.

The applicant's counsel urged this court to apply the overriding objective and allow the applicant to amend the application and insert the proper provision. It is the position of this court that, overriding objective principle cannot be misused by promoting non-compliance of legal requirement. There is plethora of authorities to that effect and for today I would refer the decision of this court by my Learned Sister Hon. Makani J in **Land Revision No.3 of 2020 Juma Mohamed Futo Versus Shabani Selemani (Administrator of the Estate of the Late Abdala Juma Konge**) where she observed that: -

> *".... wrong citation of the enabling provision goes to the root of application. It is not a technical matter as opined by the applicant. Simply stated, wrong citation of enabling provision cannot be cured by the principle of overriding objective.*

In that decision she also cited the Court of Appeal decision in the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited and 4 Others, Civil Appeal No.66 of 2017 (CAT-Arusha) (unreported)** where it was held that:

"Regarding 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."

Based on the above decisions, the circumstances in this case does not attract the invocation of the overriding objective principle. The error encountered is that which renders the application to be improper before the court. The only remedy available for such an application is to strike it out and not to order its amendment. That being said, this application is hereby struck out. However, since the applicant has conceded in the very early stage of the preliminary objection then no order for costs is made.

DATED at **ARUSHA** this 31st day of March 2022.

HIGH COURT OF TANZANIA

D.C. KAMUZORA

JUDGE