

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

CRIMINAL REVISION NO. 2 OF 2022

(Arising from the Order of the District Court of Moshi at Moshi dated 13th September 2023 in Criminal Case No.317 of 2020)

FREDRICK VENDELIN MASSAWE.....1ST APPLICANT

IGNAS IRENI MASSAWE2ND APPLICANT

EVARIST IRENI MASSAWE3RD APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

16th Aug.& 14th Sept. 2023.

A.P.KILIMI, J.:

This is the ruling in respect to two objections raised by the Respondent to the effect that; first, that the court has been wrongly moved under section 272 & 273 (1) (b) of Criminal Procedure Act Cap.20 R.E.2019 hereinafter "CPA" and second, that the application has been taken by event considering that there is a case already before the Resident Magistrates' Court of Moshi.

These objections have risen after the applicants hereinabove filed an application by way of chamber summons moving this court under section 43

(1) (a) of the Magistrates' Court Act. Cap. 11 R.E. 2019 hereinafter "MCA" and section 272 and 273 (1) (b) of the Criminal Procedure Act. (supra) praying for the order of revising and set aside the ruling and dismissal order of District Court of Moshi at Moshi dated 13th September 2023 in Criminal Case No.317 of 2020, but further prayed this court to order the case be continued with hearing before another Magistrate.

When these objections were tabled before me for hearing Ms. Edith Msenga learned State Attorney for the respondent submitted that the District Court dismissed the case under section 225(5) of CPA and applicants hereinabove were discharged. Subsequently applicants have moved this court under section 43(1) of MCA and section 272 and 273(b) of CPA but this provision does not move this court, since section 272 for CPA excuse assessors from attending a particular session, while 273(b) also deal with assessors. In respect to section 272 (1) of CPA she said is non-existing and section 42 (1) of MCA talks about Revision which originate from Primary Court.

The learned State Attorney further submitted that the proper provision required to be used was 372(1) and (2) and 373(1) and (b) both be CPA R.E. 2022. Meanwhile in respect to the second objection, she argued that the

application is taken by event, because the said case is already refiled before the Resident Magistrate Court and it has been registered as Criminal Case No. 56 of 2022, and it was filed on 15th September, 2022, and as an office they copied the charge sheet to the applicants, therefore, she is praying this court to dismiss this application forthwith.

Mr. Patrick Paul, learned Advocate for the applicants responding to the above, started with second objection and contended that the preliminary objection raised is not purely point of law, and according to **Mukisa Biscuit case** the same should not be entertain by the court, since the said point is based on evidence. Mr. Paul further told this court that, what the applicants prayed among their prayer, was the order dated 13th September, 2022 emanating at District Court of Moshi Criminal Case No 317 of 2022 be set aside and the matter to proceed with hearing, the applicant never prayed the matter to be refiled, therefore their prayers are not yet taken by events.

In respect to first point of objection, Mr. Patrick Paul contended that, the law stands wrong citation is not fatal, provided that the court has jurisdiction to grant prayers, this power is under section 372(1) (2) and 373(1) (b) and CPA and therefore the said wrong citation which is obvious was a slip of pen, does not oust this court to determine the matter. He further

invited this court to consider oxygen principle, which allows this court since it has jurisdiction and for the interest of justice to entertain and determine the matter before it to its finality, he therefore praying this court to overrule these objections so that the application be determined on merit.

In brief rejoinder, Ms. Edith Msenga insisted her submission in chief and added that she is also aware of the oxygen principle, however she urged the same should not be misused in this particular application, since the law should be followed to avoid frivolous application.

I have considered the rival submissions above, to start with second objection as argued by the learned counsel for the Applicants, I have considered the nature of the objection raised, I totally concede with Mr. Patrick Paul that the same need to be ascertained by evidence showing whether the case is taken by event, thus I am of the considered view can not be the point of law. For this purpose, I wish to reiterate the celebrated principle in such respect, which was avowed in the case of **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd.** (1969) EA696, wherein Sir Charles Newbold P. had this to say at page 701:-

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion.**"*

[Emphasis added]

Having observed above and in support of the said principle, I thus find this objection devoid of merit and overruled forthwith.

Next is the first objection, I have considered the law, it is true all of the said provisions do not provide for the application sought by the applicants, nonetheless other provisions are none existing in our law such as 273 (1) (b) of CPA and 43 (1) (a) of MCA.

In considering the above, I am aware, it is a principle of law that wrong or non-citation renders the application incompetent as the court is not able to grant what is prayed. (See **China Henan International Co-operation Group vs. Salvand Rwegasira** [2006] TLR 220; **Peter Swai vs. The Managing Editor, Majira Newspaper and Another**, Civil Application No.

203 of 2013, CAT at DSM and **Jimmy Lugendo vs. CRDB Bank Ltd. Civil**, Application No. 171 of 2017, CAT at DSM (Both unreported).

Mr. Patrick Paul has relied on the principle of overriding objectives and prayed this court to rule out so that substantive justice be attained, to my view according to the above principle and the nature of this case, it means even if is allowed to proceed the prayers sought cannot be granted, thus it goes without saying that the same goes to the root of the case. I wish to fortify this stance by the case of **Puma Energy Tanzania Limited vs. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of 2008, CAT at DSM (unreported), where the court observed that wrong citation of the enabling provision of the law goes to the root of the case, hence cannot be cured through the principle of overriding objective.

For the aforesaid reasons I am convinced and find this preliminary objection meritorious, thus I hold that the application is defective for wrong citation of the enabling provision of the law, hence I struck out forthwith. No costs.

It is so ordered.

DATED at **MOSHI** this day 14th September 2023.



X 

JUDGE
Signed by: A. P. KILIMI

Court: Ruling delivered today on 14th day of September 2023 in the presence of Mr. Patrick Paul advocate for applicant, Ms. Edith Msenga, learned State Attorney for Respondent absent, and also all applicants present.

Sgd: A. P. KILIMI
JUDGE
14/09/2023